CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 34 **JULY 12, 2000** **NO. 28**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

General Notices

IMPLEMENTATION OF ELECTRONIC FILING AND STATUS OF PROTESTS

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document advises the public that following completion of test procedures under the National Customs Automation Program, the electronic filing and status of protests is now operational in all service ports of Customs. The document also sets forth the results of the concluded test, describes the current operation of the electronic protest program, and invites the public to provide comments on an ongoing basis regarding the program.

FOR FURTHER INFORMATION CONTACT:

For operational or policy issues: Millie Gleason, Office of Field Operations (202–927–0625).

For protest system or automation issues: Steve Linnemann, Office of Information and Technology (202–927–0436).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Statutory and regulatory test procedures

The National Customs Automation Program (NCAP) is contained in sections 411–414 of the Tariff Act of 1930, as amended (19 U.S.C. 1411–1414). The NCAP is described in section 411(a) as an automated and electronic system for processing commercial importations that includes, as one of its planned components, the electronic filing and status of protests. The NCAP in section 413(b) requires the development of an implementation plan for each planned component, the testing of each planned component to assess its viability, the evaluation of each planned component to assess its contribution to the goals of the NCAP, and the transmission of the implementation plan, the testing results, and an evaluation report to the House Committee on Ways and Means and the Senate Committee on Finance. Section 413(b) further provides that a planned NCAP component may be implemented on a permanent basis if at least 30 days have passed after transmission of the imple-

mentation plan, testing results and evaluation report to the two Congressional committees.

Regulatory standards regarding NCAP testing are set forth in § 101.9(b) of the Customs Regulations (19 CFR 101.9(b)) and include a requirement of publication of notices in the Federal Register and in the CUSTOMS BULLETIN both prior to implementation of a test (for purposes of inviting public comments on any aspect of the test and informing the public of the eligibility criteria for voluntary participation in the test and the basis for selecting participants) and after completion of a test (to describe the results of the test).

On January 30, 1996, Customs published in the Federal Register (61 FR 3086) a notice announcing a plan to conduct a test regarding the electronic filing of protests, involving the use of transaction sets within the Automated Broker Interface (ABI) portion of the Customs Automated Commercial System (ACS). The test would allow the electronic filing of, and the electronic tracking of the status of, the following:

- Protests against decisions of Customs under 19 U.S.C. 1514;
- Petitions or claims for refunds of customs duties or corrections of errors requiring reliquidation pursuant to 19 U.S.C. 1520(c) and (d); and
- Interventions in an importer's protest by an exporter or producer of merchandise from a country that is a party to the North American Free Trade Agreement under § 181.115 of the Customs Regulations.

That January 30, 1996, notice stated that the test would be implemented at selected ports, outlined the eligibility criteria for voluntary participation in the test, including test participation application procedures and the basis for participation selection, and stated that the final results of the test would be published as provided in § 101.9(b) of the Customs Regulations. The notice further provided that the test would run for approximately six months commencing no earlier than May 1, 1996, and prescribed a deadline of February 29, 1996, for the submission of public comments concerning any aspect of the test and for contacting Customs for the purpose of participating in the test.

On December 31, 1996, Customs published in the Federal Register (61 FR 69133) a notice announcing an extension of the electronic protest filing test through April 1997. This notice stated that the test was currently operational with regard to 6 of the 17 entities (importers, customs brokers, legal firms and sureties) that volunteered to participate in the test and that 8 ports were originally selected for the test. The notice further stated that while the test would not be opened to new participants at that time, Customs was considering expanding the test to include up to 7 additional ports. The notice also invited comments from the public concerning any aspect of the test.

On September 24, 1997, Customs published in the Federal Register (62 FR 50053) a notice announcing both an extension of the electronic protest filing test through December 1997 and an expansion of the test to encourage new participants. This notice stated that Customs antici-

pated that this NCAP component would be available to all interested parties by January 1998. The notice also solicited public comments concerning any aspect of the test.

Test results

Following conclusion of the test, Customs on December 17, 1999, submitted an evaluation report, entitled "Electronic Filing and Query of Protest Test," to the House Committee on Ways and Means and the Senate Committee on Finance as required by 19 U.S.C. 1413(b). The test results reflected in that report are described below.

As of February 12, 1999, a total of 3,861 filings were made during the test, involving 15,277 associated entries. Of those 3,861 filings, 860 involved protests under 19 U.S.C. 1514, 103 involved petitions under 19 U.S.C. 1520(c), and 2,898 involved claims under 19 U.S.C. 1520(d). Again, as of February 12, 1999, among the 3,861 filings, 478 had been approved, 614 had been denied in full, 29 had been denied in part, 230 had been denied as untimely, 2,156 remained open, 235 were in suspended status pending the outcome of requests for internal advice or applications for further review or court action, and 119 had been withdrawn.

For purposes of satisfying the test evaluation requirement of 19 U.S.C. 1413(b), a user satisfaction survey was conducted. To this end, the external group of trade community users participated in a Structured Group Interview (SGI) and the internal group of Customs users participated in a questionnaire.

A. *External group*

On October 1, 1997, the Protest Team (which consisted of personnel from various Customs offices and a representative of the National Customs Brokers and Forwarders Association of America) conducted the SGI with the test participants in Washington, DC. A representative of the Office of Planning and Evaluation, experienced in the SGI technique, acted as moderator/facilitator. The group compiled random lists of positive and negative factors and then, by polling, eliminated some and prioritized those remaining:

1. Positives:

- No need to physically deliver paper; more efficient.
- Easier to get status of protest.
- Easier to file when time is short.
- Better standardization of filing:

  —Fewer errors, and
  —Edits provide check of information submitted.

2. Negatives:

- Recap status query report is non-informational.
- Cannot file 520(a) electronically.
- Attorneys have no electronic access to liquidation information.

- Electronic format does not include a filer's contact person.
- Filer has to retype narrative when multiple protests are filed on the same issue.

3. Resolution:

It was decided that the recap query could not be made more informational without causing it to take on the character of the full file query.

The Protest Team has recommended that the Office of Field Operations and the Office of Information and Technology review the ABI query capabilities now available to other filers to determine which might be made available to law firms. It has also informed the Office of Field Operations that interest was expressed in filing other actions electronically.

Those filers who deem it desirable to identify a contact will include the contact person's name and telephone number within the narrative portion of the electronic filing.

The narrative portion, containing the statement of the nature and justification for the objection to the protested Customs decision, is a required element of a protest (see 19 CFR 174.13, contents of protest) and therefore cannot be waived. However, the task of duplicating it for use in multiple protests or petitions can be accomplished efficiently by using word processing software, such as Word Perfect or MS Word, to compose and edit it and then cut and paste it into the protest for transmission to Customs.

B. *Internal group*

During the month of December 1998, the Protest Team conducted a survey of Customs users. A representative of the Office of Planning and Evaluation acted as consultant on development of the survey. Prior to issuing the survey to all users, it was administered to a group of twelve import and entry specialists at six of the test ports as an assessment group. Results from the assessment group were used to make the final version of the survey. Administration of the survey was facilitated by electronic protest coordinators at the service ports. Completed surveys were returned to the Protest Team for evaluation.

Two hundred and seven persons, or about 77 percent of the survey recipients, responded. Of those, 63 percent participated in processing 19 U.S.C. 1514 protests, 22 percent took part in 19 U.S.C. 1520(c) petitions, and 12 percent took part in 19 U.S.C. 1520(d) claims.

Prior to the electronic protest procedure, Customs entry specialists were the primary users of, and had the most knowledge of, the ACS protest system. That system was merely a tracking device for paper protests and letters of petition. Import specialist involvement amounted to no more than changing team assignments. The electronic protest system is both a tracking system and an electronic equivalent of the protest form (Customs Form 19) and of letters of petition or claim. Implementation took entry and import specialists to a new level of use and involvement. Fifty percent of those surveyed indicated that electronic protest had some impact on their job. While electronic protest requires

them to perform new tasks using ACS functions, 62 percent of those responding indicated that those new tasks were no more difficult than those performed using other ACS systems, and 10.6 percent indicated that the tasks were actually easier.

Concomitant to the development of electronic filing and query of protests, the Office of Field Operations included in its requirements a number of new elements to be used in processing both paper and electronic protests, petitions, claims, and interventions. Therefore, several survey questions asked about specific new system data fields and new regulatory procedures. For example, it was asked whether or not the user knew that a record could be flagged as NAFTA-related, that it could be indicated whether or not samples and hardcopy materials were associated with the filing, and that test summons and internal advice case numbers could be cited. Further, it was asked whether or not the user knew about three other related procedures whereby the protestant can challenge a denial of an application for further review and request that a denial of a protest be voided and whereby an exporter or producer from a country which is a signatory of NAFTA can intervene in an importer's 19 U.S.C. 1514 protest. A majority of entry and import specialists responded affirmatively, indicating that a good working knowledge of the system is shared across all disciplines. The concept least familiar to them was that of the foreign exporter or producer of goods from Canada or Mexico intervening in the importer's protest under 19 CFR 181.115.

Some survey questions compared and contrasted electronic protests to non-electronic protests and elicited responses regarding possible benefits of the electronic protest system. Forty-one percent of those responding judged the content and quality of the narrative submitted via electronic protest or petition or claim to be as good as those received on a Customs Form 19, and an additional 6.8 percent indicated that the narrative is actually better than in the case of non-electronic protests. Twenty-five percent indicated that the narrative was worse and another 25 percent were uncertain.

A combined total of 48.8 percent of those surveyed either merely agreed or strongly agreed with the statement that Customs saves staff-hours at the front end of protest processing because it is not necessary to date and time-stamp the Customs Form 19 and return a copy to the protestant or his agent, and because all of the required information normally entered into ACS by the entry specialist is input by the protestant or his agent electronically via ABI. A combined total of 70 percent either merely agreed or strongly agreed with the statement that Customs saves additional staff-hours and money at the back end of protest processing because it is not necessary to complete and mail the final copy of the Customs Form 19 for the 19 U.S.C. 1514 protest, or the final letter of approval or denial of the 19 U.S.C. 1520 petition or claim, to the protestant or his agent.

To support the implementation of this NCAP component, the Office of Information and Technology developed, and made available to Cus-

toms personnel, a computer-based training course. Various other means of training made available to users included classroom/computer lab training (either by local port officers or Headquarters personnel), local one-on-one training, and a revised ACS handbook. Ninety-two percent of the users surveyed had experience with one or more of these types of training. Additionally, each port was asked to name an electronic protest coordinator. In response to the question, "When you encounter a problem with the ACS electronic protest system * * * [whom do you contact?]," 57.9 percent said they check with local port personnel, 17 percent said they call ACS User Assistance, 9 percent said they call the Headquarters ACS officer, and 4 percent said they call the Office of Field Operations. No comments were received expressing an inability to receive assistance with questions or problems regarding the electronic protest system.

CURRENT STATUS OF THE ELECTRONIC PROTEST PROGRAM

The electronic filing of protests is now operational in all service ports of Customs, and participation is open to any party in interest who qualifies under the program requirements. Accordingly, using the ABI system to send records to ACS, any qualified party at interest now can file the following electronically:

- Protests against decisions of the Customs Service under 19 U.S.C. 1514;
- Petitions for refunds of Customs duties or corrections of errors requiring reliquidation pursuant to 19 U.S.C.1520(c);
- Claims for refunds of Customs duties when duty-free treatment was not claimed at the time of entry under NAFTA pursuant to 19 U.S.C. 1520(d); and
- Interventions in an importer's protest by an exporter or producer of merchandise from a country that is a party to the North American Free Trade Agreement under § 181.115 of the Customs Regulations.

In addition, the system allows amendments and addenda after the initial filing to:

- Apply for further review of a protest (if not requested at time of initial filing);
- Assert additional claims or challenge an additional decision;
- Submit alternative claims and additional grounds or arguments;
- Request review of denial of further review of a protest;
- Request accelerated disposition of a protest;
- Request that the denial of a protest be voided; and
- Withdraw the protest or petition or claim or intervention.

All of the above actions may be transmitted to Customs from a remote location anywhere in the United States. Filers receive notification of all review events, including the final decision, electronically. Additionally, filers may query their submissions at any time and share access to those records with designated third parties. The query function provides the

filer the option of receiving either an abbreviated status report (recap) on the protest, petition, claim or intervention, or a complete copy (full file) of the protest, petition, claim or intervention record. The shared access feature allows third parties to query protest records and to submit amendments and addenda.

The Client Representative Branch of the Office of Information and Technology will continue to market electronic protest to all interested parties. The Commercial Systems Branch of the Office of Information and Technology will continue to work with vendors and filers in development, test and implementation of their software for electronic protest. The Commercial Compliance Division of the Office of Field Operations will continue to respond to operational and procedural questions and issues. Customs remains open to comments and suggestions from the international trade community regarding the design, conduct, and procedures of the electronic protest program.

Dated: June 19, 2000.

JOHN H. HEINRICH,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 23, 2000 (65 FR 39224)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–2000)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of May 2000 follow. The last notice was published in the CUSTOMS BULLETIN on June 7, 2000.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: June 28, 2000.

MICHAEL SMITH,
(for Joanne Roman Stump, Chief,
Intellectual Property Rights Branch.)

The list of recordations follow:

6/01/00 U.S. CUSTOMS SERVICE PAGE 1
9:01:26 IPR RECORDATIONS ADDED IN MAY 2000 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0000081	20000516	20200516	HE IS THEY ARE	GLENNA GOODACRE	N
COP0000082	20000517	20200517	DANCING OSTRICH	MASTER TOYS & NOVELTIES INC.	N
COP0000083	20000517	20200517	CHRISTMAS TRAIN TIN	THE TIN BOX COMPANY OF AMERICA	N
COP0000084	20000517	20200517	DE CAPOLI COLLECTION MERMAIDS AND ANIMALS	GOLD UNION CORPORATION	N
COP0000085	20000523	20200523	BVLGARI-B.ZERO1 BROCHURE 1999-THE UNEXPECTED RING	BULGARI S.P.A.	N
COP0000086	20000523	20200523	BVLGARI CATALOG 1997- JEWELRY DISTRIBUTION	BULGARI S.P.A.	N
COP0000087	20000523	20200523	ROYAL CHERRY	CONGOLEUM CORPORATION	N
COP0000088	20000523	20200523	ANTIQUITY	CONGOLEUM CORPORATION	N
COP0000089	20000523	20200523	NORTHERN OAK	CONGOLEUM CORPORATION	N
SUBTOTAL RECORDATION TYPE			9		
TMK0000168	20000531	20000908	XCELLENT	EXPRESS INTERNATIONAL LTD.	N
TMK0000204	20000517	20100123	EMPORIO ARMANI & DESIGN	GIORGIO ARMANI S.P.A.	N
TMK0000205	20000518	20050725	QUANTIPLEX	BAYER CORPORATION	N
TMK0000206	20000518	20080317	QUANTIPLEX	BAYER CORPORATION	N
TMK0000207	20000518	20060507	QUANTIPLEX AND DESIGN	BAYER CORPORATION	N
TMK0000208	20000518	20061230	CIRCLE WITHIN A CIRCLE DESIGN	REMO INC.	N
TMK0000209	20000518	20090706	TWIX 2X & DESIGN	MARS INCORPORATED	N
TMK0000210	20000518	20080707	VITO RUFOLO	VITO RUFOLO	N
TMK0000211	20000523	20060203	AMERICAN EXPRESS BOX LOGO DESIGN	AMERICAN EXPRESS COMPANY	N
TMK0000212	20000523	20060611	HABLANDO INGLES	AUDIO VISUAL LANGUAGE INC.	N
TMK0000213	20000523	20060611	HABLANDO INGLES	AUDIO VISUAL LANGUAGE INC.	N
TMK0000214	20000523	20070311	AMIGO	AUDIO VISUAL LANGUAGE INC.	N
TMK0000215	20000523	20051111	AMERICAN EXPRESS	AMERICAN EXPRESS COMPANY	N
TMK0000216	20000524	20091221	SIMI (STYLIZED LETTERING) & DESIGN	WATCH CLUB INC.	N
TMK0000217	20000524	20100411	SAHIL WITH LINE	WATCH CLUB INC.	N
TMK0000218	20000524	20091221	SAHIL WITH LINE	WATCH CLUB INC.	N
TMK0000219	20000524	20100307	SAHIL WITH LINE	WATCH CLUB INC.	N
TMK0000220	20000524	20100418	SAHIL WITH LINE	WATCH CLUB INC.	N
TMK0000221	20000526	20190810	HI CUTLINE	CUTLINE INTERNATIONAL INC.	N
TMK0000222	20000526	20050618	LONGHORNS	UNIVERSITY OF TEXAS SYSTEM	N
TMK0000223	20000526	20050730	THE UNIVERSITY OF TEXAS	UNIVERSITY OF TEXAS SYSTEM	N
TMK0000224	20000526	20070908	T (STYLIZED)	UNIVERSITY OF TEXAS SYSTEM	N
TMK0000225	20000526	20070908	CONFIGURATION OF A BULL HEAD	UNIVERSITY OF TEXAS SYSTEM	N
TMK0000226	20000526	20090509	TEMPLE UNIVERSITY	TEMPLE UNIVERSITY	N
TMK0000227	20000526	20080802	T IN A BOX (STYLIZED)	TEMPLE UNIVERSITY	N
TMK0000228	20000526	20071223	KENTUCKY WILDCATS	UNIVERSITY OF KENTUCKY	N
TMK0000229	20000526	20071104	UK (STYLIZED)	UNIVERSITY OF KENTUCKY	N
TMK0000230	20000526	20070211	UK WITH DESIGN	UNIVERSITY OF KENTUCKY	N
TMK0000231	20000526	20080714	WILD BOAR	UNIVERSITY OF ARKANSAS	N
TMK0000232	20000526	20091107	WILD BOAR WITH A	UNIVERSITY OF ARKANSAS	N
TMK0000233	20000526	20091114	WILD BOAR WITHIN A	UNIVERSITY OF ARKANSAS	N
TMK0000234	20000526	20091114	RAZORBACKS	UNIVERSITY OF ARKANSAS	N
TMK0000235	20000526	20070722	N	UNIVERSITY OF NEBRASKA	N
TMK0000236	20000526	20071202	N WITH HUSKERS	UNIVERSITY OF NEBRASKA	N
TMK0000237	20000526	20060312	W STYLIZED	UNIVERSITY OF WISCONSIN	N
TMK0000238	20000526	20050620	WISCONSIN BADGERS	UNIVERSITY OF WISCONSIN	N
TMK0000239	20000526	20050620	W WITH DESIGN	UNIVERSITY OF WISCONSIN	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0000240	20000526	20011015	UNIVERSITY OF WISCONSIN	UNIVERSITY OF WISCONSIN	N
TMK0000241	20000526	20050620	BADGER WEARING A SWEATER	UNIVERSITY OF WISCONSIN	N
TMK0000242	20000526	20071104	UNIVERSITY OF KENTUCKY	UNIVERSITY OF KENTUCKY	N

SUBTOTAL RECORDATION TYPE 40

TOTAL RECORDATIONS ADDED THIS MONTH 49

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 28, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF COVERS FOR JUNCTION BOXES AND RELAY BOXES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of covers for junction boxes and relay boxes.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoke a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of covers for junction box and relay housings, and any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on May 24, 2000, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 11, 2000.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on May 24, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 21, proposing to revoke *NY* E 86526, dated September 2, 1999, which classified covers for junction box housings and relay box housings in subheading 8708.29.50, HTSUS. No comments were received in response to this notice. It is now evident, however, that these covers are for finished junction boxes and relay boxes, each complete with electricals.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking *NY* E86526 to reflect the proper classification of the covers for junction boxes and

relay boxes in subheading 8538.90.60, HTSUS, as molded parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537, pursuant to the analysis in *HQ* 963269. This decision is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: June 27, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 27, 2000.

CLA–2 RR:CR:GC 963269 JAS
Category: Classification
Tariff No. 8538.90.60

MS. IKUE STOEHR
TOYOTA MOTOR SALES, U.S.A., INC.
19001 South Western Avenue
Torrance, CA 90509–2991

Re: *NY* E86526 Revoked; Molded Plastic Covers for Junction Boxes and Relay Boxes.

DEAR MS. STOEHR:

In *NY* E86526, which the Director of Customs National Commodity Specialist Division, New York, issued to your company on September 2, 1999, articles referred to as covers for junction box housings and relay housings were found to be classifiable as other parts and accessories of motor vehicle bodies, in subheading 8708.29.50, Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* E86526 was published on May 24, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 21. No comments were received in response to that notice. However, you have since clarified the fact that these covers are for finished junction boxes and relay boxes, each complete with electricals.

Facts:

The articles at issue are of molded plastic and constitute the top half portion (designated part #82672–06060) of a junction box, and the top half portion (designated part #82661–02020) of a relay box. Junction boxes constitute apparatus for making connections to or in electrical circuits while relay boxes constitute apparatus for switching electrical circuits. Junction boxes and relays are attached by brackets to the inside of the engine compartment of a motor vehicle.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:

3926.90.98	Other
* * * * * * *	
8538	Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537:
8538.90	Other:
8538.90.60	Molded parts
* * * * * * *	
8708	Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories of bodies:
8708.29.50	Other

Issue:

Whether the molded plastic covers for junction boxes and relay boxes are articles of plastics or parts of junction boxes and relays.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. Though not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. *See Nidec Corporation v. United States*, 861 F. Supp. 136, *aff'd*. 68 F. 3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. *See* Note 2(b). All other parts are to be classified in heading 8538, among others, as appropriate. *See* Note 2(c).

Relays are a type of apparatus for switching electrical circuits. They are electrical devices by means of which the circuit is automatically controlled by a change in the same or another circuit. Relays for a voltage not exceeding 1,000 volts are provided for in heading 8536, HTSUS. Junction boxes are a type of apparatus for making connections to or in electrical circuits. They consist of boxes fitted internally with terminals or other devices for connecting together electrical wires. Junction boxes for a voltage exceeding 1,000 volts are provided for in heading 8535, HTSUS, while those for a voltage not exceeding 1,000 volts are provided for in heading 8536.

Under the authority of Section XVI, Note 2(b), HTSUS, plastic covers which are parts suitable for use solely or principally with boxes containing relays of heading 8536 are provided for in heading 8538, HTSUS. Under Section XVI, Note 2(c), HTSUS, plastic covers which are parts of junction boxes of headings 8535 and 8536, but for which no principal use can be determined, are likewise provided for in heading 8538.

Holding:

Under the authority of GRI 1 and Section XVI, Note 2, HTSUS, molded plastic covers for junction boxes and relay boxes, parts #82672–06060 and #82661–02020, respectively, are provided for in heading 8538. They are classifiable in subheading 8538.90.60, HTSUS.

Effect on Other Rulings:

NY E86526, dated September 2, 1999, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 10

RIN 1515–AC59

CIVIL AIRCRAFT

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations concerning the duty-free entry of civil aircraft merchandise to reflect amendments to General Note 6 of the Harmonized Tariff Schedule of the United States made by the Miscellaneous Trade and Technical Corrections Act of 1996. This document invites the public to comment on the proposed changes.

DATES: Comments must be received on or before August 28, 2000.

ADDRESS: Written comments (preferably in triplicate), regarding both the substantive aspects of the proposed rule and how it may be made easier to understand, may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Dixie Staple, Office of Field Operations, at (202) 927–1131.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This document proposes to amend § 10.183 of the Customs Regulations (19 CFR 10.183), which concerns Customs duty-free treatment of civil aircraft merchandise. Section 10.183 implements General Note 6 of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202), which implements the Agreement on Trade in Civil Aircraft (Title VI of the Trade Agreements Act of 1979, Pub. L. 96–39, 93 Stat. 144, July 26, 1979), to provide duty-free treatment for qualifying civil aircraft merchandise upon compliance with certain requirements.

General Note 6 of the HTSUS was amended by section 12 of the Miscellaneous Trade and Technical Corrections Act of 1996 (the Act), Pub. L. 104–295, 110 Stat. 3514 (October 11, 1996). Prior to the amendment, General Note 6, HTSUS, required that an importer entering merchandise duty-free thereunder must file with Customs a written statement certifying that the merchandise (i) is civil aircraft or has been imported for use in civil aircraft, (ii) will be so used, and (iii) has been approved for civil aircraft use by, or an application for approval has been submitted to, the Administrator of the Federal Aviation Administration (FAA) (or has been approved by an airworthiness authority in the country of exportation if such approval is recognized by the FAA). General Note 6 defined the term "civil aircraft" as all aircraft other than aircraft purchased for use by the Department of Defense or the United States Coast Guard.

Prior to the amendment of General Note 6, HTSUS, § 10.183 of the Customs Regulations (19 CFR 10.183) provided that the written statement required under General Note 6, HTSUS, (referred to in the regulation as a certificate or certification) must be filed with each entry summary or be on file with Customs at the time of entry as a blanket statement at the port where the entry is filed (19 CFR 10.183(c)). The regulation also provided that the statement could not be treated as a missing document for which a bond could be posted pending its later production (under 19 CFR 141.66), and that failure to timely file the statement or to have a valid blanket statement on file at the port would result in a dutiable entry (19 CFR 10.183(c)(2)).

The Act amended General Note 6, HTSUS, to eliminate the statement (certification) filing requirement and to provide that an importer makes a claim for duty-free treatment under the General Note by entering the merchandise under a tariff provision for which the program indicator "Free (C)" appears in the "Special" subcolumn of the tariff. This is accomplished by placing the program indicator "C" on the entry summary. This claim, in accordance with General Note 6 as amended by the Act, is deemed the importer's certification that the merchandise being entered is civil aircraft or has been imported for use in civil aircraft and will be so used. Although the amendment eliminated the statement filing requirement, it requires that an importer maintain documentation to support the claim. It also provides that an importer may amend an entry or file a written statement to claim duty-free treatment under General Note 6, HTSUS, any time before the liquidation of the entry becomes final.

These statutory amendments to General Note 6, HTSUS, establish the basis for the amendments to § 10.183 proposed in this document. The proposed amendments to the regulation expand its coverage, eliminate the requirement that supporting documentation be filed with each entry summary, require that supporting documentation be maintained in the importer's records, eliminate the statement (certification) filing requirement, allow an importer to make a claim under General Note 6,

HTSUS, after the filing of an entry but before its liquidation becomes final, and provide that no interest attaches to refunds of duty resulting from post-entry claims.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)) on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Adoption of the proposed amendments regarding civil aircraft will make importations of such merchandise less burdensome for importers than is the case under current regulations. Accordingly, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments to the Customs Regulations, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has previously been reviewed and approved by the Office of Management and Budget (OMB) under OMB control number 1515–0065 (Entry Summary), 1515–0069 (Immediate Delivery Application), and 1515–0144 (Customs Bond Structure). This rule does not propose any substantive changes to the existing approved information collection.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices contributed in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Aircraft, Customs duties and inspection, Entry, Reporting and recordkeeping requirements.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, part 10 of the Customs Regulations (19 CFR Part 10) is proposed to be amended as follows:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for part 10 continues to read, and the specific authority citation for § 10.183 is added, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * * * *

Section 10.183 also issued under 19 U.S.C. 1202 (General Note 6, HTSUS);

* * * * * * *

2. Section 10.183 is revised to read as follows:

§ 10.183 Duty-free entry of civil aircraft, aircraft engines, ground flight simulators, parts, components, and subassemblies.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to aircraft, aircraft engines, and ground flight simulators, including parts, components, and subassemblies thereof, that qualify as civil aircraft under General Note 6 of the Harmonized Tariff Schedule of the United States (HTSUS) by meeting the following requirements:

(1) The aircraft, aircraft engines, ground flight simulators, or parts, components, and subassemblies thereof, are used as original or replacement equipment in the design, development, testing, evaluation, manufacture, repair, maintenance, rebuilding, modification, or conversion of aircraft; and

(2) they are either:

(i) manufactured or operated pursuant to a certificate issued by the Administrator of the Federal Aviation Administration (FAA) under 49 U.S.C. 44704, or pursuant to the approval of the airworthiness authority in the country of exportation, if such approval is recognized by the FAA as an acceptable substitute for the FAA certificate;

(ii) covered by an application for such certificate, submitted to and accepted by the FAA, filed by an existing type and production certificate holder pursuant to 49 U.S.C. 44702 and implementing regulations (Federal Aviation Administration Regulations, title 14, Code of Federal Regulations); or

(iii) covered by an application for such approval or certificate which will be submitted in the future by an existing type and production certificate holder, pending the completion of design or other technical requirements stipulated by the FAA (applicable only to the quantities of parts, components, and subassemblies as are required to meet the stipulation).

(b) *Department of Defense or U.S. Coast Guard use.* If purchased for use by the Department of Defense or the United States Coast Guard, aircraft, aircraft engines, and ground flight simulators, including parts, components, and subassemblies thereof, that qualify as civil aircraft under General Note 6 of the HTSUS are subject to this section only if they are used as original or replacement equipment in the design, development, testing, evaluation, manufacture, repair, maintenance, rebuilding, modification, or conversion of aircraft and meet the requirements of either paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(c) *Claim for admission free of duty.* Merchandise qualifying under paragraph (a) or paragraph (b) of this section is entitled to duty-free admission in accordance with General Note 6, HTSUS, upon meeting the requirements of this section. An importer makes a claim for duty-free admission under this section and General Note 6, HTSUS, by properly entering qualifying merchandise under a provision for which the rate of duty "Free (C)" appears in the "Special" subcolumn of the HTSUS and by placing the special indicator "C" on the entry summary. The fact that qualifying merchandise has previously been exported with benefit of drawback does not preclude free entry under this section.

(d) *Importer certification.* In making a claim for duty-free admission as provided for under paragraph (c) of this section, the importer is deemed to certify, in accordance with General Note 6(a)(ii), HTSUS, that the imported merchandise is civil aircraft as described in paragraph (a) or paragraph (b) of this section or has been imported for use in civil aircraft and will be so used.

(e) *Documentation.* Each entry summary claiming duty-free admission for imported merchandise in accordance with paragraph (c) of this section must be supported by the written order or contract and any additional documentation Customs may require to verify the claim for duty-free admission, including evidence of compliance with the FAA certification requirement of paragraph (a)(2)(i), (a)(2)(ii), or (a)(2)(iii) of this section. This required documentation need not be filed with the entry summary, but must be maintained in accordance with the record-keeping provisions of Part 163 of this chapter. An importer not in possession of the required supporting documentation at the time of entry may not then claim duty-free admission under this section but may later make a duty-free claim after entry in accordance with paragraph (f) of this section. Customs may request production of supporting documentation at any time to verify the claim for duty-free admission. Proof of end use of the entered merchandise need not be maintained.

(f) *Post-entry claim.* An importer may file a claim for duty-free treatment under General Note 6, HTSUS, after filing an entry that made no such duty-free claim, by filing a written statement with Customs any time prior to liquidation or prior to the liquidation becoming final. When filed, the written statement constitutes the importer's deemed certification. In accordance with General Note 6, HTSUS, any refund

resulting from a claim made under this paragraph will be without interest, notwithstanding the provision of 19 U.S.C. 1505(c).

(g) *Verification.* The port director will monitor and periodically audit selected entries made under this section.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: June 7, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 29, 2000 (65 FR 40067)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 00–63)

BETHLEHEM STEEL CORP., INLAND STEEL CO., INC., AND U.S. STEEL GROUP A UNIT OF USX CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALGOMA STEEL INC., GERDAU MRM STEEL AND STELCO, INC., INTERVENOR-DEFENDANTS

Court No. 96–05–01313

[Plaintiffs' motion for judgment on agency record granted in part and denied in part; remanded to International Trade Administration.]

(Decided June 2, 2000)

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider and *James C. Hecht)* for the plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, and *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(Linda A. Andros* and *Jeffrey C. Lowe),* of counsel, for the defendant.

Hogan & Hartson L.L.P. (Mark S. McConnell, Richard L. A. Weiner and *Roger P. Alford)* for intervenor-defendant Algoma Steel Inc.

Ross & Hardies (Peter A. Martin) for intervenor-defendant Gerdau MRM Steel.

Willkie Farr & Gallagher (Christopher A. Dunn, Daniel L. Porter and *Jacqueline A. Weisman)* for intervenor-defendant Stelco, Inc.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* Pursuant to CIT Rule 56.2, the plaintiffs have interposed a motion for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada; Final Results of Antidumping Duty Administrative Reviews,* 61 Fed.Reg. 13,815 (March 28, 1996). Those *Final Results* include margins of dumping both kinds of steel by Stelco, Inc. of 0.19 and 0.92 percent, respectively, as well as 1.82 and 0.02 percent for cut-to-length plate from Algoma Steel Inc.

and Manitoba Rolling Mills, respectively.[1] The plaintiffs, the petition of which led to the underlying antidumping-duty order, contest the *Results* with regard to the cut-to-length steel plate[2] on the specified grounds that the ITA erred in (a) accepting after verification an unverified change in the unit value of Algoma scrap; (b) accepting costs reported for less than all of that company's facilities which produced the steel under review; (c) accepting incorrect price adjustments for Stelco products; (d) accepting unsupported MRM rebates; (e) accepting partial-year information as to MRM general-and-administrative expenses in calculating cost of production and constructing value; (f) accepting unsupported claimed credit expenses for that company; and (g) relying on a ministerial error in calculating margin(s) for Algoma.

The defendant responds that this case should be remanded to the ITA to

> (1) correct a ministerial error in Commerce's model match program for Algoma Steel * * * and (2) to reconsider the adjustment made for the credit expenses for * * * MRM[]. Plaintiffs' motion, however, should be denied in all other respects * * *.

Defendant's Memorandum, p. 1. Counsel for the first-named intervenor do

> not oppose a remand by this Court to the Department for the sole and limited purpose of correcting the ministerial error with instructions for the Department to take full account of the accuracy of corrections to the computer programming code.

Brief of Algoma Steel Inc., pp. 30–31. On its part, MRM takes the position that none of plaintiffs' points, including that with regard to its credit expenses, merits any judicial relief. Stelco, Inc. also argues that the agency's *Final Results* should be affirmed in their entirety.

I

Jurisdiction to decide plaintiffs' motion is pursuant to 28 U.S.C. §1581(c). And the standard for review of the contested ITA determination is whether it is unsupported by substantial evidence on the record or otherwise not in accordance with law.[3]

A

For the merchandise at issue, the record reflects three stages of production at Algoma Steel, denominated as slab, rolling, shearing, during each of which scrap resulted. The company determined the amount and cost thereof at each stage and reported it as a cost of production and also, because the scrap was either sold or remelted, reported a scrap-revenue amount.

---

[1] *See* 61 Fed.Reg. at 13,833. Each of these companies has intervened herein as a party defendant, the last *sub nom.* Gerdau MRM Steel, which will be referred to hereinafter by the acronym in the record, MRM.

[2] Issues focusing on the corrosion-resistant carbon steel flat products are discussed *sub nom. AK Steel Corp. v. United States*, 21 CIT 1204 (1997), remand results *aff'd*, 22 CIT ____, Slip Op. 98–106 (July 23, 1998).

[3] 19 U.S.C. §1516a(b)(1)(B) (1994). As noted in *AK Steel Corp. v. United States*, *supra*, amendments to this governing Title 19, U.S.C. effectuated by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), do not apply to administrative reviews commenced before January 1, 1995, which is the case here. *See* 21 CIT at 1205 n. 1, citing *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed.Cir. 1995).

During the process of ITA verification of the data provided, Algoma notified the agency that it had discovered a "minor" clerical error in the calculation of yield loss[4] at one of its shearing lines, and it submitted a "corrections memorandum", which the ITA determined to accept. *See* 61 Fed.Reg. at 13,818. The agency did so, having verified the existence of the error and also having recognized that, as a result of its correction, not only the yield-loss factor changed, scrap revenue did as well. *See id.;* Brief for Algoma Steel Inc., Exhibit 1.

The plaintiffs point out that this revision was produced several months after the deadline for submission of factual information specified in 19 C.F.R. §353.31(a)(1)(ii) (1994). The ITA concluded, however, that the submission was based upon the error detected during verification and that the correction in scrap revenue was not new information received in contravention of the foregoing regulation. *See* 61 Fed.Reg. at 13,818. The court concurs; that is, its receipt was in accordance with law.

As for plaintiffs' position that the correction is not supported by substantial evidence, the record shows the yield-loss percentage at the shearing stage to be a known figure, as are the numbers for the volume and the value of Algoma's production of sheared steel plate. Dividing that volume by that percentage gives a figure for the volume of steel entering that stage. That is, that resultant number was derived; it was not otherwise determined in the regular course of Algoma's process of manufacture. Hence, when the percentage for yield loss was found during agency verification to be too high, its downward adjustment necessarily increased the figure for the volume of unshorn plate and thus also for the cost thereof. Since the volume and value of the finished product were known and verified, the net effect of the yield-loss percentage correction was to increase the scrap-revenue number.

The plaintiffs complain that, "if only the total tonnage of scrap changes (and not the unit value of scrap) then, as a matter of simple arithmetic, the rate of change of total scrap revenue should be identical" to the rate of change in total tonage of scrap. Plaintiffs' Brief, p. 15, n. 25. However, the corrected yield-loss percentage changed both total tonnage of scrap and its unit value. When the yield-loss percentage decreased, the total amount of steel entering the shearing stage and total costs at that stage increased. Therefore, the scrap-revenue amount had to increase by the same amount as the cost of the additional steel. The unit value of scrap is derived by dividing the scrap-revenue amount by the total volume of sheared plate. Since that volume of sheared plate was fixed, the unit value of scrap also had to increase. In sum, the record evidence supports the ITA's acceptance of Algoma's correction.

B

The plaintiffs allege that the ITA erred in accepting Algoma's costs as reported. That is, the company produced subject merchandise on two mills, a 166-inch plate mill and a 106-inch strip mill, but the former

[4] *See* Record Document ("R.Doc") 421, p. 1. *See also* Confidential Record Document ("ConfDoc") 204, first page.

rolled a greater percentage of cut-to-length steel plate than the strip mill. Algoma calculated cost of production on a process basis in which the monthly operational costs were recorded for each mill without allocation to specific products. *See* R.Doc 306, p. 17.

During its administrative review, the ITA requested that Algoma allocate costs on the basis of the different widths and gauges of steel. In doing so, the company

> started with total rolling costs for each mill for each time period. Dividing that number by the tons produced by the mill during the period yielded average rolling costs per ton. Algoma then attributed rolling costs to individual widths and gauges based on the average cost, adjusted to reflect mill productivity in producing different widths and gauges.

Brief of Algoma Steel Inc., p. 16. The plaintiffs do not object to this particular methodology, rather to Algoma's reliance on plate-mill costs for those of the strip mill. As explained by the company, the

> Strip Mill produces non-subject merchandise almost exclusively * * *. The only Strip Mill cost recorded in Algoma's records, however, is overall cost of Strip Mill operations for a time period, which is determined almost entirely * * * by the cost of rolling merchandise that is *not* subject to the investigation. There exists no separate record for the cost of rolling subject merchandise on the Strip Mill—there simply are no "actual" costs-for rolling of plate on the Strip Mill. Instead, this number had to be developed by allocation. Algoma had two options in this respect: either Algoma could assign a cost that is drawn from Strip Mill experience, but reflects almost entirely non-subject merchandise, or Algoma could assign a cost that reflects the cost of subject merchandise as it is rolled on the Plate mill, assigning that cost to all plate irrespective of whether the plate was produced on the Plate Mill or the Strip Mill.

Id. at 16–17 (emphasis in original). Nonetheless, the plaintiffs contend that, since the company was able to report actual costs, the ITA should be required to apply to the strip mill the best information otherwise available or "BIA", which was defined at the time to include the factual information submitted in support of the petition. 19 C.F.R. § 353.37(b) (1994).

Certainly, the ITA has a duty to make determinations as accurately as possible. *E.g., NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed.Cir. 1995); *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed.Cir. 1990). And parties should provide the information requested in an accurate and timely manner. *See, e.g., Societe Nouvelle de Roulements v. United States,* 19 CIT 1362, 1368, 910 F.Supp. 689, 694 (1995); *Yamaha Motor Co. v. United States,* 19 CIT 1349, 1359, 910 F.Supp. 679, 687 (1995). Indeed, failure to do so resulted in resort to best information otherwise available per 19 U.S.C. §1677e and 19 C.F.R. §353.37 (1994). *E.g., Union Camp Corp. v. United States,* 20 CIT 931, 938–39, 941 F.Supp. 108, 115 (1996), and cases cited therein. Moreover, the agency, not a party under review, is responsible for deciding what in-

formation is needed. *See, e.g., Olympic Adhesives, Inc. v. United States,* 899 F.2d 1565, 1572 (Fed.Cir. 1990); *Comitex Knitters, Ltd. v. United States,* 16 CIT 817, 821, 803 F.Supp. 410, 414 (1992).

Historically, "Congress has granted Commerce considerable latitude in determining cost of production."[5] There was no requirement that actual costs be used or that a particular methodology be followed. Rather, the agency had discretion to choose between "reasonable alternatives". *Technoimportexport, UCF America Inc. v. United States,* 16 CIT 13, 18, 783 F.Supp. 1401, 1406 (1992).

Here, finding that Algoma was unable to provide product-specific costs but that a "relatively accurate calculation" was presented, the ITA verified the "soundness and reasonableness" of that methodology. Defendant's Memorandum, p. 21, citing *Floral Trade Council v. United States,* 17 CIT 392, 399, 822 F.Supp. 766, 772 (1993). The plaintiffs claim that, because actual cost data were available, yet unreported, the ITA had to rely on BIA, which the agency was directed to use whenever it was "unable to verify the accuracy of information submitted" or "whenever a party * * * [wa]s unable to produce information requested in a timely manner and in the form required, or otherwise significantly impede[d] an investigation." 19 U.S.C. §1677e(b) & (c) (1994). In doing so, the agency could consider the "degree of cooperation by the respondent * * * in reaching its decision either to apply BIA or accept the available information." *AK Steel Corp. v. United States,* 21 CIT 1204, 1223 (1997), *remand results aff'd,* 22 CIT ____, Slip Op. 98–106 (1998). Given this standard, this court cannot conclude that the ITA was required to rely on BIA for Algoma.

The plaintiffs argue that the company's methodology skewes the difference-in-merchandise ("difter") adjustment and 20-percent test for product comparability.[6] Foreign-market value could be adjusted for differences in price attributable to differences in physical characteristics of the goods. *See* 19 U.S.C. §1677(16)(B) & (C); §1677b(a)(4)(C) (1994). The ITA was authorized to

> make a reasonable allowance for differences in the physical characteristics of merchandise compared to the extent that [it] is satisfied that the amount of any price differential is wholly or partly due to such difference.

19 C.F.R. §353.57(a) (1994). Furthermore, in determining whether an allowance is reasonable, the agency "normally will consider differences in the cost of production but, where appropriate, may also consider differences in the market value." *Id.,* §353.57(b).

---

[5] *Timken Co. v. United States,* 18 CIT 486, 494, 852 F.Supp. 1122, 1129 (1994). *But see* Uruguay Round Agreements Act, Pub.L. No. 103–465, §224, 108 Stat. 4809, 4882 (1994).

[6] The petitioners stated in their brief before the agency in regard to Algoma:

> In the instances where the U.S. sales are matched to non-identical home market products, there is no way to ensure that the U.S. total cost of manufacture is accurate, and therefore there is no way to determine whether the 20 percent test (to show comparability) has been properly performed. Moreover, there is no way to determine that the U.S. variable costs, which are used to calculate the difmer and, in turn, the margins for such sales, are accurate. Accordingly, BIA must be used for all such sales as well.

R.Doc 473, p. 14. Despite defendant's argument, the ITA did have an opportunity to consider this matter, and it is therefore now properly before the court.

The 20-percent test is set forth in Import Administration Policy Bulletin 92.2 (July 29, 1992), wherein the ITA reports that, when "the variable cost difference exceeds 20%, we consider * * * the probable differences in values of the items to be compared [] so large that they cannot be reasonably compared." *See, e.g., SKF USA Inc. v. United States,* 19 CIT 54, 57, 874 F.Supp. 1395, 1399 (1995) (this approach sustained on the ground that "there is a statutory preference for comparison of most similar, if not identical, merchandise").

Whenever actual costs are not available and the ITA relies on a respondent's other, existing data to ascertain the cost of production, a petitioner may argue that they distort the difmer. But the law does not require reliance on actual costs, and the record indicates that the ITA made a reasonably accurate assessment of the costs in this case, thereby minimizing any arguable distortion.

The court is urged, "at the very least, [to] require the Department to apply partial BIA in the comparison of nonidentical merchandise where at least one product was produced on the strip mill or on both mills." Plaintiffs, Brief, p. 34. In support of this plea, the plaintiffs cite *Cemex, S.A. v. United States,* 20 CIT 993 (1996), and *Timken Co. v. United States,* 18 CIT 897, 865 F.Supp. 850 (1994). In those two cases, however, the court upheld resort to best information otherwise available where the ITA had repeatedly requested information which the respondents failed to provide. Here, the record reflects Algoma Steel provided requested information, and the agency's decision not to resort to BIA was in accordance with law.

C

Intervenor-defendant Stelco, Inc. claimed an adjustment to foreign-market value for billing errors corrected by debit and credit notes. *See* 61 Fed.Reg. at 13,831. The plaintiffs allege that the ITA erred in accepting the adjustment. The defendant agrees that price adjustments made for billing errors must be transaction-specific but states that the company did allocate the debit and credit notes on a transaction-specific basis. *See id.*

Adjustments to the price of a product in response to billing errors for a particular customer constitute direct selling expenses. *Torrington Co. v. United States,* 82 F.3d 1039, 1050 (Fed.Cir. 1996). In order to receive an adjustment for direct selling expenses, they must be tied to specific transactions.[7] Stelco's method "matched each credit and debit note to the specific invoice or invoices to which the note applied so that the ad-

[7] *Cf. NSK Ltd. v. United States,* 190 F.3d 1321, 1328–29 (Fed.Cir. 1999) (adjustment for direct selling expenses denied because not reported on a transaction-specific basis); *AK Steel Corp. v. United States,* 21 CIT at 1224:

> The adjustments at issue are not for widely available discounts, rebates or similar items which may or may not be determinable on a fixed or constant basis across numerous sales. Rather they are for generally variable adjustments for clerical or other billing errors. Such adjustments must be related on the record to specific transactions, either directly or through proper allocation.

justments were transaction-specific". Defendant's Memorandum, p. 30. *See also* 61 Fed.Reg. at 13,831. The defendant notes that,

> when the adjustment is made with reference to a specific invoice or invoices that cover the merchandise under investigation, it is clear that the adjustment is transaction-specific, even if it is allocated.[8]

The "danger of allocation * * * is the averaging effect on prices." 61 Fed.Reg. at 13,831. Where, as here, price adjustments are tied to specific invoices, allocations are essentially transaction-specific, and that danger is diminished.

Plaintiffs' position is also based on the discovery during agency verification of an improper allocation to several sales of a particular adjustment that actually pertained to just one. *See* Plaintiffs' Brief, pp. 42–43. They claim that "this distortion did not represent an isolated error in Stelcols reporting; rather it reflected Stelco's *methodology* for allocating price adjustments." *Id.* at 44–45 (emphasis in original). Both the defendant and the company claim it was indeed an "isolated instance" of incorrect reporting, "resulting in a minor and limited * * * error" that was "nothing more than a[] clerical oversight on the part of a Stelco employee."[9] Given the small number of verified sales with debit or credit notes, however, this court is unable to determine on the record presented whether the agency's adjustment is supported by substantial evidence.

D

The ITA granted MRM a circumstances-of-sale adjustment to foreign-market value for rebates given to customers on subject merchandise. *See* 61 Fed.Reg. at 13,828. Such adjustments are

> generally allow[ed] * * * for discounts and rebates where respondents have granted and paid them on sales of subject merchandise to unrelated parties during the period of review. Such discounts or rebates should be part of a respondent's standard business practice and not intended to avoid potential antidumping duty liability.

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed.Reg. 31,692, 31,717 (July 11, 1991).

---

[8] Defendant's Memorandum, p. 31. The ITA's *Final Results* herein state that

> Stelco reported the majority of these expenses on a transaction-specific basis. However, on occasion, Stelco allocated debit and credit notes for a particular customer over more than one invoice. While the Department prefers that discounts, rebates and other price adjustments be reported on a transaction-specific basis, the Department has long recognized that some price adjustments are not granted on that basis, and thus cannot be reported on that basis.

61 Fed.Reg. at 13,831. In *AK Steel Corp. v. United States, supra,* the court recognized that, "[w]hen dealing with limited adjustments applicable to a very few invoices[,] the distinction between 'directly transaction specific' and 'properly allocated' seems to blur", and upheld the allowance of properly allocated adjustments. 21 CIT at 1226. The court reported that the adjustments therein "do appear to be proper allocations." *Id.* In this case, while the ITA does appear to be confused as to whether or not Stelco's adjustments are transaction-specific, it at least takes the position that the adjustments are properly allocated. *See* 61 Fed.Reg. at 13,831–32.

[9] Defendant's Memorandum, pp. 34–35. *See also* Stelco's Brief, pp. 11–13. The company adds that it was "the very unusual circumstance that a single correcting credit note was issued for two billing errors that was the cause of the cross-referencing error." Stelcols Brief, p. 13. But the court fails to discern evidence on the record that the company ordinarily issued a credit note for each billing error.

The plaintiffs complain that MRM presented insufficient evidence to support its claimed adjustment, but the record shows that the ITA was provided with substantial evidence in the form of correspondence between the company and some of its customers noting the existence of the rebates. *See* ConfDoc 194; Defendant's Confidential Appendix, Exhibit 9. In addition, the agency was able to verify that the adjustments were tied to the specific transactions at issue. *See id.*

E

In determining MRM's cost of production, the ITA calculated the company's general-and-administrative ("G&A") expenses for the period of review (February 1993 through July 1994) based upon audited annual financial statements for 1993 and 1994. *See* 61 Fed.Reg. at 13,829. The plaintiffs contend that

> MRM's inclusion of partial-year data in its reported G&A expense ignores the Department's long-standing practice of calculating G&A expense "using the annual audited income statement for the [one] fiscal year covering the greatest part of the [period of review]."

Plaintiffs' Brief, p. 61, citing *Ferrosilicon From Brazil; Final Results of Antidumping Duty Administrative Review,* 61 Fed. Reg. 59,407, 59,412 (Nov. 22, 1996). They ask this court to instruct the agency "to recalculate MRM's G&A expense using MRM's 1993 annual audited financial statements only." *Id.* at 62.

As noted above, the ITA historically has had latitude in determining cost of production but also has been charged with the duty to make determinations as accurately as possible. The agency admits that its

> long-standing practice is to calculate G&A expenses from the audited financial statements which most closely correspond to the [period of review].

61 Fed.Reg. at 13,829. It does this because of "their nature as period costs." *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From Thailand,* 60 Fed.Reg. 22,557, 22,560 (May 8, 1995). General-and-administrative expenses

> can neither be easily nor accurately matched to the revenues generated from the sales of an individual unit of production. Instead, G&A expenses are typically incurred in connection with a company's overall operations. Many expenses catecorized as G&A, such as insurance and bonus payments, are incurred sporadically throughout the fiscal year. Moreover, G&A expenses are often accrued during the fiscal year based on estimates that are then adjusted to actual expenses at year-end.

Id.

In each determination cited by the plaintiffs to support their contention that the 1994 data should be excluded, the ITA took such an approach because the data came from unaudited financial statements. *See, e.g., id.* at 22,560–61; *Certain Cut-to-Length Carbon Steel Plate From*

Finland: Final Results of Antidumping Duty Administrative Review, 61 Fed.Reg. 2,792, 2,794 (Jan. 29, 1996); *Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand,* 60 Fed.Reg. 29,553, 29,565 (June 5, 1995).

Reliance on full-year audited financial statements provides a more accurate picture of general production costs than expenses attributed to a shorter period. Where, as here, however, the period of review covered substantially more than one year, and audited annual financial statements for the two years involved were available, the ITA's decision to rely on both of them to determine G&A expenses for MRM was within its discretion and is supported by substantial evidence on the record.

F

The plaintiffs complain that the ITA should not have allowed an adjustment to foreign-market value for MRM's estimated credit expenses because the company initially had records of actual expenses but chose not to preserve them. *See* Plaintiffs' Brief, p. 55. The defendant agrees that this issue should be remanded for reconsideration because the ITA

> wrongly equated MRM's not retaining actual dates of payment in its computer records beyond 90 days with the circumstance where a respondent has no reason to ever maintain such data.

Defendant's Memorandum, pp. 46–47.

The company responds that automatic purging of this data from its computer system was in line with its usual business practice, complied with Canadian generally accepted accounting principles, and the ITA "accepted an estimate because it was reasonably accurate." Response Brief of Gerdau MRM Steel, pp. 10–11.

In *NSK Ltd. v. United States,* 19 CIT 1013, 1026, 896 F.Supp. 1263, 1274 (1995), *aff'd in part, rev'd in part on other grounds,* 115 F.3d 965 (Fed.Cir. 1997), the court upheld the ITA's disallowance of home-market credit expense where a respondent's

> computer records did not permit transaction or customer-specific calculation of credit expenses [and,] consequently, it calculated this expense by allocating total home market credit expenses over each transaction.

The court stated that "an adjustment to FMV for differences in circumstances of sale is appropriate where the value determination is directly correlated with specific in-scope merchandise on the basis of actual costs." 19 CIT at 1026–27, 896 F.Supp. at 1274, *citing Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States,* 713 F.2d 1568, 1580 (Fed.Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Krupp Stahl A.G. v. United States,* 17 CIT 450, 822 F.Supp. 789 (1993), the court upheld resort to BIA where original data were unavailable because the respondent had discarded its business records after five years in accordance with the rules of its home country.

Here again, the court must emphasize that the most important consideration in cost determination is accuracy of the information sub-

mitted. Respondents will not be allowed to manipulate margins via reporting to their own convenience, nor will petitioners be allowed to do so by insisting on BIA where another, accurate approach is possible. If the ITA is able, upon remand, to make a reasonably accurate estimation of the credit expenses tied to specific transactions from the data submitted by MRM, resort to BIA, which is now called "facts otherwise available" in the Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, §231(c), 108 Stat. 4809, 4896 (1994), should not occur. If, however, the agency is unable to verify the accuracy of the data made available, reliance on BIA would be appropriate.

G

The plaintiffs complain about a ministerial error in Algoma's model-match program. Both the defendant and the company confirm the existence of such an error. *See* Defendant's Memorandum, p. 14; Brief for Algoma Steel Inc., p. 30.

II

In view of-the foregoing, plaintiffs' motion for judgment upon the agency record must be granted to the extent of remand to the ITA for reconsideration of (c) their allegation of a methodological problem in Stelco, Inc.'s allocation of price adjustments and (f) the allowance of an adjustment for MRM's credit expenses, as well as (g) to correct the agreed-upon ministerial error in Algoma Steel Inc.'s model-match program. In all other respects, the aforesaid motion must be, and it hereby is, denied.

The agency may have 90 days for such reconsideration and to report the results thereof to this court, whereupon the parties may serve and file any comments thereon within 30 days, with replies thereto due 15 days thereafter.

(Slip Op. 00–64)

NTN BEARING CORP. OF AMERICA, NTN CORP., AMERICAN NTN BEARING MANUFACTURING CORP., NTN DRIVESHAFT, INC., NTN-BOWER CORP., NSK LTD., NSK CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–10–01801

Plaintiffs and defendant-intervenors, NTN Bearing Corporation of America, NTN Corporation, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN"), NSK Ltd. and NSK Corporation (collectively "NSK"), and Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, NTN, NSK and Koyo argue that Commerce erred in conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the seventh administrative review of a 1989 antidumping duty order.

NTN further contends that Commerce erred in: (1) recalculating NTN's United States credit expenses on a transaction-specific rather than on a customer-specific basis for constructed export price ("CEP") sales; (2) denying a price-based, level of trade ("LOT") adjustment to normal value ("NV") under 19 U.S.C. § 1677b(a)(7)(A) for its CEP sales; (3) refusing to accept NTN's reported home market and United States indirect selling expenses based on different trade levels; (4) refusing to calculate CEP profit on a LOT-specific basis; (5) denying a downward adjustment to NTN's reported United States indirect selling expenses for imputed interests incurred in financing cash deposits for antidumping duties; (6) refusing to exclude NTN's reported zero-price sample sales from its United States sales database; (7) failing to adjust NTN's cost of production ("COP") and constructed value ("CV") data on a model-specific basis; (8) including NTN's sales with abnormally high profits and certain home market sample sales from the NV calculation; and (9) excluding certain NTN home market sales to affiliated parties in the NV calculation. NTN, however, claims that Commerce correctly accepted its reported home market discounts as direct price adjustments to NV.

NSK also asserts that Commerce erred in: (1) deducting NSK's United States repacking expenses as direct selling expenses pursuant to 19 U.S.C. § 1677a(d)(1)(B); (2) calculating profit for CV under 19 U.S.C. §§ 1677b(e)(2)(A), 1677(16); and (3) denying a partial, price-based LOT adjustment to NV under 19 U.S.C. § 1677b(a)(7)(A) for CEP sales when matched to its after-market sales in its home market.

Koyo additionally claims that Commerce properly accepted Koyo's reported home market billing adjustments as direct price adjustments to NV.

Commerce responds that it properly: (1) construed 19 U.S.C. § 1675(a)(4) and (c) as authorizing it to conduct a duty absorption inquiry for the subject review; (2) treated NSK's United States repacking expenses as direct selling expenses under 19 U.S.C. § 1677a(d)(1)(B); (3) calculated CV profit; (4) recalculated NTN's United States credit expenses on a transaction-specific basis for CEP sales; (5) denied a LOT adjustment for NTN's CEP sales; (6) interpreted 19 U.S.C. § 1677b(a)(7) as not providing for a partial LOT adjustment for NSK's CEP sales; (7) recalculated NTN's home market and United

States indirect selling expenses without regard to LOT, however, since it did not state in the *Final Results* its reasons for recalculating NTN's home market indirect selling expenses, requests that the issue be remanded so it may articulate its reasons for such recalculation; (8) determined NTN's CEP profit without regard to LOT; (9) denied an adjustment to NTN's reported indirect selling expenses for imputed interests allegedly incurred in financing antidumping duty cash deposits; (10) included NTN's sample sales in its United States sales database; (11) adjusted NTN's COP and CV data; (12) included NTN's sales with abnormally high profits and home market sample sales in the NV calculation; (13) disregarded NTN's affiliated party sales from the NV calculation; and (14) treated Koyo's reported home market billing adjustments and NTN's reported home market discounts as direct price adjustments to NV.

Although Torrington generally agrees with Commerce, it maintains that Commerce erred in accepting Koyo's home market billing adjustments and NTN's alleged home market discounts as direct price adjustments in calculating NV.

Held: NTN's, NSK's and Koyo's USCIT R. 56.2 motions are denied in part and granted in part. Torrington's USCIT R. 56.2 motion is denied. The case is remanded to Commerce to: (1) annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for this review; (2) make adjustments pursuant to 19 U.S.C. § 1677a(c) to § 1677a(a)'s starting price for determining EP; (3) make adjustments pursuant to § 1677a(c) and (d) to § 1677a(b)'s starting price for determining CEP; (4) articulate how the record supports its decision in the *Final Results* to recalculate NTN's home market indirect selling expenses without regard to LOT; (5) clarify how it complied with 19 U.S.C. §§ 1677e, 1677m by using facts available and applying an adverse inference with respect to NTN's alleged zero-price sample sales and, if Commerce determines that it conformed with the statutory framework, to include NTN's sample sales in its United States sales database or, if Commerce determines it did not adhere to all of the statutory prerequisite conditions, to give NTN the opportunity to remedy or explain any deficiency regarding its sample sales; and (6) clarify whether NTN was provided with notice and opportunity to respond pursuant to § 1677m(d) with regard to its COP and CV data.

[NTN's, NSK's and Koyo's USCIT R. 56.2 motions are denied in part and granted in part. Torrington's USCIT R. 56.2 motion is denied. Case remanded.]

(Dated June 5, 2000)

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, David G. Forgue and *Christine H.T. Yang)* for NTN.

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for NSK.

Powell, Goldstein, Frazer & Murphy LLP (Peter O. Suchman, Neil R. Ellis, Elizabeth C. Hafner, Ronald E. Minsk and *Leigh Fraiser)* for Koyo.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, *Velta A. Melnbrencis,* Assistant Director Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *Stacy J. Ettinger, Thomas H. Fine, Patrick V. Gallagher, Myles S. Getlan, Rina Goldenberg* and *David R. Mason,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Geert De Prest and *Lane S. Hurewitz)* for Torrington.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs and defendant-intervenors, NTN Bearing Corporation of America, NTN Corporation, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN"), NSK Ltd. and NSK Corporation (collectively "NSK"), and Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of

the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews* ("*Amended Final Results*"), 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

NTN, NSK and Koyo argue that Commerce erred in conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for this seventh administrative review of a 1989 antidumping duty order.

NTN also contends that Commerce erred in: (1) recalculating NTN's United States credit expenses on a transaction-specific rather than on a customer-specific basis for constructed export price ("CEP") sales; (2) denying a price-based, level of trade ("LOT" or "LOTs" for "levels of trade") adjustment to normal value ("NV") under 19 U.S.C. § 1677b(a)(7)(A) for its CEP sales; (3) refusing to accept NTN's reported home market and United States indirect selling expenses based on different trade levels; (4) refusing to calculate CEP profit on a LOT-specific basis; (5) denying a downward adjustment to NTN's reported United States indirect selling expenses for imputed interests incurred in financing cash deposits for antidumping duties; (6) refusing to exclude NTN's reported zero-price sample sales from its United States sales database; (7) failing to adjust NTN's cost of production ("COP") and constructed value ("CV") data on a model-specific basis; (8) including NTN's sales with abnormally high profits and certain home market sample sales from the NV calculation; and (9) excluding certain NTN home market sales to affiliated parties in the NV calculation. NTN, however, claims that Commerce correctly accepted its reported home market discounts as direct price adjustments to NV.

Further, NSK asserts that Commerce erred in: (1) deducting NSK's United States repacking expenses as direct selling expenses pursuant to 19 U.S.C. § 1677a(d)(1)(B); (2) calculating profit for CV under 19 U.S.C. §§ 1677b(e)(2)(A), 1677(16); and (3) denying a partial, price-based LOT adjustment to NV under § 1677b(a)(7)(A) for CEP sales when matched to its after-market sales in its home market.

Koyo also claims that Commerce properly accepted Koyo's reported home market billing adjustments as direct price adjustments to NV.

Commerce responds that it properly: (1) construed § 1675(a)(4) and (c) as authorizing it to conduct a duty absorption inquiry for the subject review; (2) treated NSK's United States repacking expenses as direct

selling expenses under § 1677a(d)(1)(B); (3) calculated CV profit; (4) recalculated NTN's United States credit expenses on a transaction-specific basis for CEP sales; (5) denied a LOT adjustment for NTN's CEP sales; (6) interpreted § 1677b(a)(7) as not providing a partial LOT adjustment for NSK's CEP sales; (7) recalculated NTN's home market and United States indirect selling expenses without regard to LOT, however, since it did not state in the *Final Results* its reasons for recalculating NTN's home market indirect selling expenses, requests that the issue be remanded so it may articulate its reasons for such recalculation; (8) determined NTN's CEP profit without regard to LOT; (9) denied an adjustment to NTN's reported indirect selling expenses for imputed interests allegedly incurred in financing antidumping duty cash deposits; (10) included NTN's sample sales in its United States sales database; (11) adjusted NTN's COP and CV data; (12) included NTN's sales with abnormally high profits and home market sample sales in the NV calculation; (13) disregarded NTN's affiliated party sales from the NV calculation; and (14) treated Koyo's reported home market billing adjustments and NTN's reported home market discounts as direct price adjustments to NV.

Although Torrington generally agrees with Commerce, it maintains that Commerce erred in accepting Koyo's home market billing adjustments and NTN's alleged home market discounts as direct price adjustments in calculating NV.

The Court will address each of these arguments in turn.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from several countries, including Japan. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904. This case concerns the seventh administrative review of the antidumping duty order on AFBs from Japan for the period of review ("POR") covering May 1, 1995 through April 30, 1996. In accordance with 19 C.F.R. § 353.22(c) (1995), Commerce initiated the seventh review on June 20, 1996.[1] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Duty Administrative Reviews and Notice of Request for Revocation of an Order*, 61 Fed. Reg. 31,506 (June 20, 1996). On June 10, 1997, Commerce published the preliminary results of the seventh review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial*

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

Termination of Administrative Reviews ("*Preliminary Results*"), 62 Fed. Reg. 31,566. Commerce published the *Final Results* on October 17, 1997, *see* 62 Fed. Reg. at 54,043, and the *Amended Final Results* on November 20, 1997, *see* 62 Fed. Reg. at 61,963. Oral argument was held on March 8, 1999.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. *Substantial Evidence Test*

"'[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the substantiality of evidence, the Court must take into account the entire record, including "whatever in the record fairly detracts from its weight." *Universal Camera*, 340 U.S. at 488.

II. *Chevron Two-Step Analysis*

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). "Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Flora Trade Council v. United States*, 23 CIT ___, ___, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction

of the statute is permissible. *Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided that Commerce has acted reasonably, the Court may not substitute its judgment for the agency's. *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); *see also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (noting that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another"). "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." *Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT ____, ____, 15 F. Supp. 2d 807, 813 (1998).

DISCUSSION

I. *Commerce's Duty Absorption Inquiry*

A. Background

Title 19, United States Code, § 1675(a)(4) provides that during an administrative review initiated two or four years after the "publication" of an antidumping duty order, Commerce, if requested by a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter."[2] Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider in conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D).

On May 31, 1996 and July 9, 1996, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to § 1675(a)(4) with respect to various respondents, including Koyo, NTN and NSK, to determine whether antidumping duties had been absorbed during the POR. *See Final Results*, 62 Fed. Reg. at 54,075.

In the *Final Results*, Commerce found that duty absorption had occurred for the POR. *See id.* at 54,044. In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders," as defined in 19 U.S.C. § 1675(c)(6)(C) (1994) (that is, antidumping duty orders, *inter alia*, deemed issued on

---

[2] Subsection (a)(4) of 19 U.S.C. § 1675 was added to the antidumping law by the Uruguay Round Agreements Act ("URAA") in 1994. *See* Pub. L. No. 103-465, § 220, 108 Stat. 4809, 4860.

January 1, 1995), regulation 19 C.F.R. § 351.213(j)(2)[3] provides that Commerce "will make a duty-absorption determination, if requested, for any administrative review initiated in 1996 or 1998." *See id.* at 54,074 (citing *19 CFR Part 351 et al., Antidumping Duties; Countervailing Duties; Final [R]ule*, 62 Fed. Reg. 27,296, 27,394 (May 19, 1997)). Commerce also noted that although the regulation did not bind it for this seventh AFB review, it constitutes a public statement of how Commerce construes § 1675(a)(4).[4] *See id.* Commerce concluded that (1) because the antidumping duty order on the AFBs in this case has been in effect since 1989, the order is a transition order pursuant to § 1675(c)(6)(C), and (2) since this review was initiated in 1996 and a request was made, Commerce had the authority to make a duty absorption inquiry for the seventh POR. *See id.* at 54,075.

B. Contentions of the Parties

Koyo, NSK and NTN argue that: (1) Commerce lacked authority under § 1675(a)(4) to conduct a duty absorption inquiry for the seventh administrative review of the 1989 antidumping duty order; and (2) even if Commerce possessed the authority to conduct such an inquiry, Commerce's methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* Koyo's Mem. Supp. Mot. J. Agency R. at 5–12; NSK's Mem. Supp. Mot. J. Agency R. at 30–34; NTN's Mem. Supp. Mot. J. Agency R. at 28–37.

Commerce argues it properly construed subsections (a) and (c) of § 1675 as authorizing it to make duty absorption inquiries for antidumping duty orders that were issued and published prior to January 1, 1995. *See* Def.'s Mem. in Partial Opp'n to Pls.' Mots. J. Agency R. at 12–20. Commerce also asserts that it devised and applied a reasonable methodology for determining duty absorption. *See id.* at 20–28. Torrington generally agrees with Commerce's contentions. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 11–16.

C. Analysis

In *SKF USA Inc. v. United States*, 24 CIT ____, Slip Op. 00–28 (Mar. 22, 2000), this Court determined that Commerce lacked statutory authority under 19 U.S.C. § 1675(a)(4) to conduct a duty absorption inqui-

---

[3] The full text of 19 C.F.R. § 351.213(j) (1997) provides:

(j) *Absorption of antidumping duties.*

(1) During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under § 351.211, or a determination under § 351.218(d) (sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

(2) For transition orders defined in section 751(c)(6) of the Act, the Secretary will apply paragraph (j)(1) of this section to any administrative review initiated in 1996 or 1998.

Id.

[4] Although 19 C.F.R. § 351.213(j) is indicative of Commerce's interpretation of the URAA, the regulation does not apply here because the administrative review in this case was initiated on June 20, 1996 pursuant to a request dated May 31, 1996. Commerce's regulations that were issued pursuant to the URAA apply only to "administrative reviews initiated on the basis of requests made on or after the first day of July, 1997." *19 CFR Part 351 et al., Antidumping Duties; Countervailing Duties; Final [R]ule*, 62 Fed. Reg. 27,296, 27,416–17 (May 19, 1997).

ry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. *SKF USA*, 24 CIT at ____, Slip Op. 00–28, at 15–22 (citations omitted). The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *Id.* at 21 (citing § 291 of the URAA).

Because the duty absorption inquiry, the methodology and the parties' arguments at issue in this case are practically identical to those presented in *SKF USA*, the Court adheres to its reasoning in *SKF USA*. The Court, therefore, finds that Commerce did not have the statutory authority under § 1675(a)(4) to undertake a duty absorption inquiry for the applicable pre-URAA antidumping duty order in dispute here.

II. *Commerce's Treatment of NSK's United States Repacking Expenses as Direct Selling Expenses*

A. Background

An antidumping duty is imposed upon imported merchandise when (1) Commerce determines such merchandise is being dumped, that is, sold or likely to be sold in the United States at less than fair value ("LTFV"), and (2) the ITC determines that an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. § 1673 (1994); 19 U.S.C. § 1677(34) (1994). To determine in an investigation or an administrative review whether there is dumping, Commerce compares the price of the imported merchandise in the United States to the NV for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b (1994). The price in the United States is calculated using either an export price ("EP") or CEP. *See* 19 U.S.C. § 1677a(a), (b) (1994).

The Statement of Administrative Action[5] ("SAA") accompanying the URAA clarifies that Commerce will classify the price of a United States sales transaction as an EP if "the first sale to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation." H.R. Doc. No. 103–316, at 822 (1994). On the other hand, "[i]f, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter," then Commerce will classify the price of a United States sales transaction as a CEP. *See id.*;19 U.S.C. § 1677a(b); *Koenig & Bauer-Albert AG v. United States*, 22 CIT ____, ____, 15 F. Supp. 2d 834, 850–52 (1998) (discussing when to apply EP or CEP methodology).

---

[5] The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656 (1994). "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

Commerce then makes adjustments to the starting price used to establish EP or CEP by adding: (1) packing costs for shipment to the United States, if not already included in the price; (2) import duties which have been rebated or not collected due to exportation of the subject merchandise to the United States; and (3) certain countervailing duties if applicable. *See* 19 U.S.C. § 1677a(c)(1)(A)–(C); SAA at 823. Also, for both EP and CEP, Commerce will reduce the starting price by the amount, if any, included in such price that is attributable to: "(1) transportation and other expenses, including warehouse expenses, incurred in bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States; and (2) * * * export taxes or other charges imposed by the exporting country." *Id.*; *see* 19 U.S.C. § 1677a(c)(2)(A), (B).

Moreover, Commerce must reduce the price used to establish CEP by any of the following amounts associated with economic activities occurring in the United States: (1) commissions paid in "selling the subject merchandise in the United States"; (2) direct selling expenses, that is, "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties"; (3) "any selling expenses that the seller pays on behalf of the purchaser" (assumptions); (4) indirect selling expenses, that is, any selling expenses not deducted under any of the first three categories of deductions; (5) certain expenses resulting from further manufacture or assembly (including additional material and labor) performed on the merchandise after its importation into the United States; and (6) profit allocated to the expenses described in categories (1) through (5). 19 U.S.C. § 1677a(d)(1)–(3); *see* SAA at 823–24.

In this case, NSK delivered the subject merchandise to unaffiliated customers in the United States from warehouses owned and operated by NSK. *See* NSK's Resp. to Sect. C Questionnaire, Investigation No. A–588–804, Admin. Rev. 5/1/95–4/30/96, at 38 (Sept. 10, 1996) (Q. 47.0, "U.S. Repacking Cost"). NSK normally ships merchandise in its original containers from its United States warehouse, however, in some instances, it repacked the merchandise to accommodate orders for smaller distributors. *See id.*

For the price of the subject merchandise in the United States, Commerce used EP or CEP, as appropriate, and calculated such prices "based on the packed [free on board], [cost, insurance, and freight], or delivered price to unaffiliated purchasers in, or for exportation to, the United States." *Preliminary Results*, 62 Fed. Reg. at 31,569. Commerce also made deductions for: (1) discounts and rebates; and (2) any movement expenses in accordance with 19 U.S.C. § 1677a(c)(2)(A). *See id.* In calculating CEP, Commerce made additional adjustments in accordance with § 1677a(d)(1)–(3) by: (1) "deducting selling expenses associated with economic activities occurring in the United States, including commissions, direct selling expenses, indirect selling expenses, and repacking expenses in the United States"; (2) "deduct[ing] the cost of any further

manufacturing and assembly[,]" where appropriate; and (3) "adjust[ing] for profit allocated to these expenses." *Id.* In particular, in adjusting CEP, Commerce deducted NSK's United States repacking expenses as direct selling expenses under § 1677a(d)(1)(B), rather than as moving expenses under § 1677a(c)(2)(A), because it determined that repacking "was performed on individual products in order to sell the merchandise to the unaffiliated customer in the United States. Presumably, if a respondent could have sold the merchandise without repacking it, the respondent would have done so. Thus, it is an expense associated with selling the merchandise." *Final Results*, 62 Fed. Reg. at 54,067.

B. Contentions of the Parties

NSK argues, as it did in the *Final Results*, *see id.*, that Commerce erred in deducting NSK's United States repacking expenses as direct selling expenses pursuant to § 1677a(d)(1)(B), *see* NSK's Mem. Supp. Mot. J. Agency R. at 11, 13. According to NSK, the United States repacking constitutes an expense incident to bringing the subject merchandise from the original place of shipment in Japan to the place of deliver in the United States and, therefore, should have been (1) classified and deducted as expense under § 1677a(c)(2)(A), and (2) excluded from the pool of selling expenses Commerce uses to determine CEP profit. *See id.*; 19 U.S.C. § 1677a(d)(3), (f)(1)(B) (calculating CEP profit based on the profit allocated to expenses described in § 1677a(d)(1)–(2)).

Specifically, NSK claims that § 1677a(c)(2)(A) is not limited to moving expenses, but includes expenses required for transporting the goods from NSK's United States warehouses into the hands of carriers for delivery to United States customers. *See* NSK's Reply Mem. Supp. Mot. J. Agency R. at 2. NSK asserts that the cost of United States repacking is such a § 1677a(c)(2)(A) expense because the goods cannot be transported unless NSK first breaks open the transpacific shipping packages, selects the specific items ordered and then repacks those items for shipment to the customer's United States location. *See id.* at 3–4. NSK clarifies that this result does not change simply because the United States repacking may be directly related to particular sales. *See id.* at 3. NSK notes that § 1677a(c)(2)(A) does not preclude the deduction of expenses directly related to a particular sale; rather, the statute includes "any additional costs, charges, or expenses," either direct or indirect, incident to bringing the subject merchandise from Japan to the United States customer. *See id.* (quoting § 1677a(c)(2)(A)). NSK contends, for instance, United States inland freight from its United States warehouse to United States unaffiliated customers, even though directly related to particular sales to such customers, nevertheless constitutes a § 1677a(c)(2)(A) expense. *See id.* Thus, NSK asserts that United States repacking expenses should similarly be treated as § 1677a(c)(2)(A) expenses even though it may be directly related to particular sales. *See id.* Finally, NSK claims that United States repacking does not otherwise meet the definitional criteria of § 1677a(d)(1)(B) direct selling expenses such as credit expenses, guarantees and warranties. *See id.* NSK notes

that such expenses assist in selling products, but do not involve transporting goods from Japan to the United States unaffiliated customer as do United States repacking expenses. *See id.*; NSK's Mem. Supp. Mot. J. Agency R. at 12.

Although agreeing with NSK's contention that United States inland freight (warehouse to customer) charges are clearly transportation expenses and thus deductible pursuant to § 1677a(c)(2)(A), Commerce responds, as it did in the *Final Results*, that NSK's United States repacking expenses bear no relationship to "moving the merchandise from one point to another," as established by the fact that "the merchandise was moved from the exporting country to the United States prior to repacking." Def.'s Mem. in Partial Opp'n to Pls.' Mots. J. Agency R. at 29–30 (quoting *Final Results*, 62 Fed. Reg. at 54,067). Commerce also contends that § 1677a(d)(1)(B) does not limit direct selling expenses deducted from CEP to credit expenses, guarantees or warranties; rather, the statute reduces CEP by the amount of any selling expenses which result, and bear a direct relationship to, selling expenses in the United States. *Id.* at 30. Since NSK's repacking was "performed on individual products in order to sell the merchandise to the unaffiliated customer in the United States," Commerce asserts that it properly treated the repacking expenses as direct selling expenses pursuant to § 1677a(d)(1)(B). *Id.* (quoting *Final Results*, 62 Fed. Reg. at 54,067).

Torrington generally agrees with Commerce's arguments. *See* Torrington's Resp. to Pls. Mots. J. Agency R. at 8, 40–41. Torrington notes, as it did in the *Final Results*, that NSK reported that it normally does not require repacking for its United States sales, but "some repacking 'occurred to accommodate smaller distributor orders.'" *Id.* at 41 (quoting NSK's Resp. to Sect. C Questionnaire, Investigation No. A–588–804, Admin. Rev. 5/1/95–4/30/96, at 38 (Sept. 10, 1996) (Q. 47.0, "U.S. Repacking Cost")). Torrington asserts that since NSK's response is consistent with Commerce's treatment of NSK's repacking expenses as selling rather than movement expenses, Commerce properly included NSK's repacking expenses in its calculation of CEP profit. *See id.*

C. Analysis

The Court finds that NSK's United States repacking expenses were not incident to bringing the subject merchandise from the original place of shipment in Japan to the place of delivery in the United States. Rather, such expenses were clearly direct selling expenses.

Direct selling expenses under § 1677a(d)(1)(B) are not limited to credit expenses, guarantees and warranties, but include "expenses which result from and bear a direct relationship to the particular sale in question." SAA at 823 (defining direct selling expenses). In this case, the particular sales in question concerned orders for smaller distributors. Although NSK reported that it normally does not perform repacking for United States sales (that is, it usually ships merchandise from its United States warehouse in its original containers), NSK acknowledged that it did some repacking to accommodate orders for smaller distributors. *See*

NSK's Resp. to Sect. C Questionnaire, Investigation No. A–588–804, Admin. Rev. 5/1/95–4/30/96, at 38 (Sept. 10, 1996) (Q. 47.0, "U.S. Repacking Cost"). The Court finds, therefore, as Commerce did in the *Final Results*, that NSK's repacking is "expense associated with selling the merchandise." 62 Fed. Reg. at 54,067.

Accordingly, the Court concludes that Commerce properly treated and deducted NSK's United States repacking expenses as direct selling expenses pursuant to § 1677a(d)(1)(B) rather than as transportation or other expenses pursuant to § 1677a(c)(2)(A).

III. *Commerce's Calculation of Profit for Constructed Value*

A. Background

For this POR, Commerce "used [constructed value] as the basis for NV when there were no usable sales of foreign-like product in the comparison market." *Preliminary Results*, 62 Fed. Reg. at 31,571. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994).[6] *See Final Results*, 62 Fed. Reg. at 54,062. In applying the "preferred" method for calculating CV profit under § 1677b(e)(2)(A), Commerce determined that "the use of aggregate data that encompasses all foreign like products under consideration for NV represents a reasonable interpretation of the statute and results in a practical measure of profit that we can apply consistently in each case." *Id.*

B. Contentions of the Parties

NSK contends, *inter alia*, that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A) and the explicit hierarchy established by 19 U.S.C. § 1677(16) (1994) for selecting the "foreign like product" for the CV profit calculation. *See* NSK's Mem. Supp. Mot. J. Agency R. at 14–17.

Commerce responds, *inter alia*, that it applied a reasonable interpretation of § 1677b(e)(2)(A) and properly based CV profit for NSK on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 30–43. Torrington generally agrees with Commerce. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 20–22.

C. Analysis

NSK raised this issue in *RHP Bearings Ltd. v. United States*, 83 F. Supp. 2d 1322 (1999), which concerned the sixth administrative review of an antidumping duty order on AFBs imported from the UK. In *RHP Bearings*, this Court held that Commerce's CV profit methodology, which consists of using the aggregate data of all foreign like products under consideration for NV, is consistent with the antidumping statute.

---

[6] In calculating constructed value, Commerce is required to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * in connection with the production and sale of a foreign like product [made] in the ordinary course of trade." 19 U.S.C. § 1677b(e)(2)(A).

See id. at ____, 83 F. Supp. 2d at 1336. Since NSK's arguments and the methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds Commerce's CV profit methodology to be supported by substantial evidence and in accordance with law.

IV. *Commerce's Recalculation of NTN's United States Credit Expenses for Constructed Export Price Sales*

A. Background

In calculating NV, 19 U.S.C. § 1677b(a)(6)(C) directs Commerce to adjust NV to account for "any differences (or the lack thereof) between the [EP or CEP] and [NV] * * * that is established to the satisfaction of [Commerce] to be wholly or partly due to * * * differences in the circumstances of sale" ("COS") between sales made in the United States and sales made in the foreign market under consideration. *See* SAA at 828 ("Additional Adjustments to Normal Value"). "Such COS adjustments are made when the seller incurs certain costs in its home market sales that it does not incur when selling to the United States market." *Torrington Co. v. United States*, 156 F.3d 1361, 1363 (Fed. Cir. 1998).

The COS adjustments include adjustments for differences in direct selling expenses such as credit expenses. *See* SAA at 828 ("Commerce will * * * employ the [COS] adjustment to adjust for differences in direct expenses"); *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ____, ____, 6 F. Supp. 2d 865, 876 (1998) (discussing COS adjustment for differences in credit costs). A COS adjustment for differences in credit expenses is made to account for the "producer's opportunity cost of extending credit to its customers. By allowing the purchaser to make payment after the shipment date, the producer forgoes the opportunity to earn interest on an immediate payment." *Mitsubishi Heavy Industries, Ltd. v. United States*, 23 CIT ____, ____, 54 F. Supp. 2d 1183, 1188 (1999). Thus, Commerce uses an imputed credit expense to reflect "the loss attributable to the time value of money." *Id.*; *see Asociacion*, 22 CIT at ____, 6 F. Supp. 2d at 876 ("As part of its calculation of selling expenses for U.S. sales, Commerce imputes a credit expense on sales to represent the cost (based upon the time value of money) to the seller of waiting for payment for its sales."). Commerce's normally calculates an imputed credit expense "based only on the cost of financing receivables between shipment date and payment date." *Mitsubishi*, 22 CIT at ____, 54 F. Supp. 2d at 1188 (quoting *Mitsubishi Heavy Industries, Ltd. v. United States*, 22 CIT ____, ____, 15 F. Supp. 2d 807, 820 (1998)).

In this case, NTN calculated its United States credit expense on a customer-specific basis. *See* Verification Report for NTN Corporation (NTN) for the 1995–96 Administrative Review of the Antidumping Duty Order on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan, A–588–804, Proprietary Doc., at 7 (May 3, 1997) ("Credit Expense"). NTN imputed the cost of credit for sales by determining monthly the average number of days for which each customer's payments were outstanding and the short-term inter-

est rate NTN paid, or would have paid, if it borrowed the same money to finance its accounts receivable. *See id.*

During the review, Torrington contended that Commerce "should recalculate NTN's United States credit expense because * * * reporting credit expense on an average basis may be distortive in cases where not all [United States] sales are dumped." *Final Results*, Fed. Reg. at 54,053. Torrington noted that NTN provided the necessary information on record to recalculate a credit expense on a "transaction-specific basis." *See id.*

NTN responded that its credit expense should not be recalculated because Commerce had accepted NTN's methodology of reporting a customer-specific average credit expense in all previous AFB reviews. *See id.*; *see, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, et al.; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,692, 31,724 (July 11, 1991) (cross-referenced by *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews*, 56 Fed. Reg. 31,754, 31,755 (July 11, 1991)) (Commerce using a customer-specific average credit expense for NTN-Japan during the first review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("sixth administrative review"), 62 Fed. Reg. 2081, 2101 (Jan. 15, 1997) (Commerce using a customer-specific average credit expense for NTN during this review).

Commerce agreed with Torrington with regard to CEP sales, finding:

> We have data on the record which allows us to calculate transaction-specific credit expense for CEP sales. Therefore, we have recalculated NTN's credit expense using the dates of payment which NTN reported. However, Torrington is incorrect in asserting that NTN reported transaction-specific payment dates for EP sales. NTN does not maintain its payment records in a manner which allows it to provide us with transaction-specific payment dates for EP sales to the United States * * *. Therefore, in these reviews, as in past reviews, we are allowing NTN to calculate its U.S. credit expense for EP sales for each customer on the basis of the average number of days that receivables are outstanding.

Final Results, Fed. Reg. at 54,053.

B. Contentions of the Parties

NTN notes that Commerce accepted NTN's calculation of credit expenses on a customer-specific basis for the previous six reviews of the antidumping duty order on AFBs from Japan. *See* NTN's Mem. Supp. Mot. J. Agency R. at 14. NTN contends that since "[t]here have been no changes in the facts or law which would compel a sudden shift" in Commerce's practice of accepting credit expenses reported on a customer-specific basis, Commerce's "prior decisions must become law of the

case." *Id.* In support of this contention, NTN relies on *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992), for the proposition that "[p]rinciples of fairness prevent Commerce from changing its methodology at this late stage * * *. Adherence to prior methodology is required in some circumstances." NTN's Mem. Supp. Mot. J. Agency R. at 14 (quoting *Shikoku*, 16 CIT at 388, 795 F. Supp. at 421 (footnote and citations omitted)). NTN, therefore, requests that the Court remand the issue to Commerce to accept NTN's customer-specific average credit expense. *See id.*

Commerce asserts that it did not apply any new process and approach in calculating NTN's United States credit expenses. Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 45. Rather, Commerce notes that it has expressed, and continues to maintain, a "preference that expenses be reported on a transaction-specific basis rather than on an average or allocated basis." *Id.* at 44. However, Commerce claims that when a company's records do not permit transaction-specific reporting, it has permitted use of average or allocated expenses as it did with NTN's credit expenses for EP sales. *Id.* Commerce argues that since NTN provided the necessary information on record which permitted a transaction-specific calculation of NTN's United States credit expenses for CEP sales, Commerce properly exercised its preference and recalculated the expenses on such a basis. *See id.* at 45. Also, Commerce contends that the principles of fairness that prevented Commerce from changing its methodology of calculating an expense at a late stage in the antidumping proceeding in *Shikoku* are not present in this case. *See id.* at 46.

Torrington agrees with Commerce, noting that, consistent with the antidumping statute and regulations, Commerce has a well-established preference for transaction-specific reporting of expenses. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 34. Also, Torrington notes that Commerce's questionnaire requesting information indicated a strong preference for reporting credit expenses on a transaction-specific basis. *See id.* Since the record contained information that permitted more precise credit expense calculations, that is, transaction-specific payment dates for NTN's CEP sales, Torrington contends that Commerce properly recalculated NTN's United States credit expenses on a transaction-specific basis. *See id.* at 34–35.

C. Analysis

The Court disagrees with NTN that Commerce is now prohibited from using transaction-specific reporting of NTN's United States credit expense merely because in the past six reviews it accepted customer-specific reporting of such expenses. Commerce does not have to adhere to its customer-specific reporting methodology for calculating credit expenses when a respondent provides the necessary information on record for calculating such expenses on a more accurate and preferred basis, that is, a transaction-specific basis. *See generally NSK Ltd. v. United States*, 19 CIT 1013, ____, 896 F. Supp. 1263, 1275 (1995) (noting that Commerce does not have to "adhere to its prior reporting methodology,

especially where Commerce is striving for more accuracy"), *rev'd on other grounds*, 115 F.3d 965 (1997); *see also id.* 19 CIT at ____, 896 F. Supp. at 1275 (explaining that "[d]irect selling expenses are incurred with respect to specific transactions. Credit, for example, is a selling expense which is only incurred when credit is extended under the terms of sale. Because credit expense is a direct expense, it should be tied to the transaction for which it was incurred.").

Further, NTN's reliance on *Shikoku*, which it cites for the proposition that Commerce must adhere to its prior decisions, is misplaced. *Shikoku* dealt with an attempt by Commerce to adopt a slightly improved allocation methodology of calculating the home market price packing adjustment after years of acceptance of another methodology. *See Shikoku*, 16 CIT at 387, 795 F. Supp. at 420–21. At issue were the fifth and sixth administrative reviews of certain merchandise imported from Japan. *See id.* at 383, 795 F. Supp. at 417–18. The plaintiffs' dumping margins for the previous three consecutive periods of review of sales of the contested merchandise were found to be either *de minimis* or had a margin of zero. *See id.* at 383, 795 F. Supp. at 418. In the fifth and sixth administrative reviews, Commerce altered its allocation methodology for calculating home market packing expenses, resulting in barely above *de minimis* margins and, thereby, Commerce refused a plaintiffs' request to revoke the outstanding antidumping duty order covering the merchandise. *See id.* at 383–84, 795 F. Supp. at 418. Commerce's new calculation was based on information which was requested for the first time at verification. *See id.* at 387, 795 F. Supp. at 421.

The court in *Shikoku* found that: (1) "Commerce [had] employed a new process and approach (both synonyms for 'methodology')" in calculating the home market packing expenses and did not merely apply its standard practice of preferring actual expenses over allocated expenses; (2) Commerce could not demonstrate that the new allocation methodology was an improvement; and (3) the evidence on record established that plaintiffs had relied on Commerce's old methodology for calculating the home market price packing adjustment by adjusting their prices in accordance with the methodology that Commerce had consistently applied in prior reviews. *See id.* at 386–87, 795 F. Supp. at 420. Under these circumstances, the court, noting that "[t]he margin resulting from the new approach * * * is barely above *de minimis*, determined that it was "simply too late to mandate another three years of administrative reviews because of a last minute 'improvement' in Commerce's methodology" and concluded that "Commerce did not have adequate reasons for its last minute change in methodology." *Id.* at 388, 795 F. Supp. at 422.

In this case, however, the Court agrees with Commerce that it did not apply, or switch to, any new methodology in calculating NTN's credit expenses; instead, Commerce merely exercised its consistent preference for transaction-specific rather than customer-specific reporting given that NTN had supplied information which permitted a transaction-spe-

cific calculation of credit expenses. Moreover, in distinct contrast to the facts in *Shikoku*, the Court notes that NTN was afforded notice of Commerce's preference for transaction-specific reporting. First, Commerce explicitly gave notice to NTN in the first and second reviews that it prefers to have the credit expense reported on a transaction-specific basis. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, et al.; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,692, 31,724 (July 11, 1991) (first administrative review) ("The Department prefers to have credit calculated on a transaction-by-transaction basis. * * * In the future, in keeping with Department practice, credit expenses should be reported, at a minimum, on a customer-specific basis. In fact, the Department's preference remains sales-specific reporting of this expense."); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360, 28,405 (June 24, 1992) (second administrative review) (noting that "the Department will not accept credit expenses not reported, at a minimum, on a customer-specific basis or some reasonable equivalent. In fact, the Department's preference remains for sales-specific reporting of this expense."). Also, as Torrington points out, Commerce's questionnaire for this review specifically reiterated the agency's preferred methodology of using transaction-specific reporting for credit expenses. *See Request for Information, Antifriction Bearings (Other Than Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* ("Commerce's Questionnaire"), Sec. C, at C–20 (June 19, 1996) (Case No. A–100–001, Fiche 02–03, Frame 03, Pub. Doc. 2) ("This [credit] expense should be calculated and reported on a transaction-by-transaction basis using the number of days between date of shipment to the customer and date of payment."). Finally, the Court finds that this case does not present the situation in which, relying upon an old methodology, NTN had actually adjusted its prices and, except for the change in methodology, it would be entitled to a revocation of the outstanding antidumping duty order. Therefore, the principles of fairness that prevented Commerce from changing its methodology in *Shikoku* are not present here.

Accordingly, the Court finds that Commerce's recalculation of NTN's United States credit expense on a transaction-specific basis was supported by substantial evidence and in accordance with law.

V. *Commerce's Denial of Level of Trade Adjustments to NSK and NTN*

A. Background

1. Statutory Provisions

Under pre-URAA antidumping law, there were no specific provisions providing for an adjustment to foreign market value ("FMV") for any difference in LOT between United States price (now EP or CEP) and FMV. Commerce, however, promulgated a regulation stating that: (1) it

normally would calculate FMV and United States price based on sales at the same commercial LOT; and (2) if such sales were insufficient to permit an adequate comparison, Commerce would calculate FMV based on such or similar sales at the most comparable LOT in the United States market, making appropriate adjustments for differences affecting price comparability. *See* 19 C.F.R. § 353.58 (1994); *see generally NEC Home Elecs., Ltd. v. United States*, 54 F.3d 736, 739 (Fed. Cir. 1995) (discussing 19 C.F.R. § 353.58).

The URAA amended the antidumping statute to provide for a specific provision regarding adjustments to NV for differences in LOTs. Instead of FMV, *see* 19 U.S.C. § 1677b (1988), the statute now provides for NV, *see* URAA § 233(a)(1), 108 Stat. at 4898 (replacing term FMV with NV), which shall be based on:

> the price at which the foreign like product is first sold (or, in the absence of sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, *to the extent practicable, at the same level of trade as the export price or constructed export price*.

19 U.S.C. § 1677b(a)(1)(B)(i) (emphasis added). The statute also provides for a LOT adjustment to NV under the following conditions:

> The price described in [§ 1677b(a)(1)(B), *i.e.*, NV,] shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price and constructed export price and the price described in [§ 1677b(a)(1)(B)] (other than a difference for which allowance is otherwise made under [§ 1677b(a)]) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—
>
> (i) involves the performance of different selling activities; and
>
> (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.
>
> In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

19 U.S.C. § 1677b(a)(7)(A). In sum, to qualify for a LOT adjustment to NV, a party has the burden to show that the following two conditions have been satisfied: (1) the difference in LOT involves the performance of different selling activities; and (2) the difference affects price comparability. *See* SAA at 829 (stating that "if a respondent claims [a LOT] adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment"); *see also NSK Ltd. v. United States*, 190 F.3d 1321, 1330 (Fed. Cir. 1999) (noting that a respondent bears the burden of establishing entitlement to a LOT adjustment).

When the available data does not provide an appropriate basis to grant a LOT adjustment, but NV is established at a LOT constituting a more advanced stage of distribution than the LOT of the CEP, the statute ensures a fair comparison by providing for an additional adjustment to NV known as the "CEP offset." *See* 19 U.S.C. § 1677b(a)(7)(B). Specifically, the CEP offset provides that NV "shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on the sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under [19 U.S.C. § 1766a(d)(1)(D)]." 19 U.S.C. § 1677b(a)(7)(B).

2. Commerce's LOT Methodology

During this review, and in several prior reviews, Commerce applied the following LOT methodology. *See Final Results*, 62 Fed. Reg. at 54,055; *Preliminary Results*, 62 Fed. Reg. at 31,571–72. In accordance with § 1677b(a)(1)(B)(i), Commerce first calculates NV based on exporting-country (or third-country) sales, to the extent practicable, at the same LOT as the United States (EP and CEP) sales. *See id.* at 31,571. When Commerce is unable to find comparison sales at the same LOT as the EP or CEP sales, it compares such United States sales to sales at a different LOT in the comparison (home or third-country) market. *See id.*

Where the LOT comparison is between NV sales and EP sales (that is, where the first sale in the United States is to an unaffiliated buyer), Commerce compares the unadjusted, NV starting price with the starting EP, without making any adjustments to EP as provided for under 19 U.S.C. § 1677a(c). *See id.* at 31,571.

With respect to the LOT methodology for CEP sales, Commerce first calculates CEP by making adjustments to its starting price under 19 U.S.C. § 1677a(d), but before making any adjustments under § 1677a(c). *See id.* Commerce reasoned that the § 1677a(d) "adjustments are necessary to arrive at, as the term CEP makes clear, a 'constructed' EP," that is, it is intended to reflect as closely as possible a price corresponding to an EP between non-affiliated exporters and importers.[7] *Final Results*, Fed. Reg. at 54,058. Commerce then determines the LOT for the "adjusted" CEP sales. *See Preliminary Results*, 62 Fed. Reg. at 31,571.

The next step in its LOT analysis is to determine whether home market sales are at a different LOT than United States (EP or CEP) sales. *See id.* In making such a determination, Commerce examines whether

[7] In the preliminary results, Commerce explained it reasons for making § 1677a(d), but not § 1677a(c), adjustments to the starting price of CEP as follows:

> We calculate the CEP by removing from the first resale to an independent U.S. customer the expenses under [19 U.S.C. § 1677a(d)] and the profit associated with these expenses. These expenses represent activities undertaken by the affiliated importer. As such, they occur after the transaction between the exporter and the importer for which we construct CEP. Because the expenses deducted under [§ 1677a(d)] represent selling activities in the United States, the deduction of these expenses normally yields a different level of trade for the CEP than for the later resale (which we use for the starting price). Movement charges, duties and taxes deducted under [§ 1677a(c)] do not represent activities of the affiliated importer, and we do not remove them to obtain the CEP level of trade.

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 62 Fed. Reg. 31,566, 31,571 (June 10, 1997).

the "home market sales are at different stages in the marketing process than the U.S. [(EP or CEP)] sales," that is, Commerce "review[s] and compare[s] the distribution systems in the home market and U.S. export markets, including selling functions, class of customer, and the extent and [LOT] of selling expenses for each claimed [LOT]." *Id.* If the EP or CEP sales and the NV sales are at a different LOT, and the differences in LOT affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the equivalent LOT of the export transaction, Commerce will make a LOT adjustment under § 1677b(a)(7)(A). *See id.* If there is no pattern of consistent price differences, no adjustment is permitted. *See id.* at 31,572. Finally, for CEP sales, if NV is established at a LOT which constitutes a more advanced stage of distribution than the LOT of the CEP, and if there is no basis for determining whether differences in the LOT between NV and CEP affects comparability of their prices, Commerce must make a CEP offset to NV under § 1677b(a)(7)(B). *See id.*

3. Denial of LOT Adjustment for CEP Sales

With respect to CEP sales, Commerce found that the same LOT as that of the CEP for merchandise under review did not exist for any respondent in the home market except for certain home market sales of respondent NMB/Pelmac. *See Final Results*, 62 Fed. Reg. at 54,056. Commerce was unable to "determine whether there was a pattern of consistent price differences between the [LOTs] based on respondents' [home market] sales of merchandise under review." *See id.*

In such cases, Commerce looked to alternative methods for calculating LOT adjustments in accordance with the SAA. *See id.* In particular, Commerce noted that the SAA states:

> "if the information on the same product and company is not available, the adjustment may also be based on sales of other products by the same company. In the absence of any sales, including those in recent time periods, to different levels of trade by the exporter or producer under investigation, Commerce may consider the selling experience of other producers in the foreign market for the same product or other products."

Id. (quoting SAA at 830). Nevertheless, Commerce determined that it would have been inappropriate to apply the LOT adjustment calculated for NMB/Pelmac to any other respondent, reasoning that "[b]ecause no respondent reported sales in the same market as NMB/Pelmac (i.e., Singapore), we have not used NMB/Pelmac's data as the basis of a level-of-trade adjustment for any other respondents." *Id.* Consequently, with respect to CEP sales which Commerce was unable to quantify a LOT adjustment, it granted a CEP offset to respondents, including NTN, where the home market sales were at a more advanced LOT than the sales to the United States, in accordance with 19 U.S.C. § 1677b(a)(7)(B). *See id.*

With respect to NSK, Commerce applied a CEP offset to NV for all of NSK's CEP sales. *See* Antifriction Bearings from Japan—NSK Ltd.

(NSK) Preliminary Results Analysis Memo Seventh Administrative Review 5/1/95–4/30/96 (Mar. 28, 1997) (Case No. A–588–804, Fiche 95, Frame 57, Pub. Doc. 177, at 59). In reaching this result, Commerce first determined for NSK that there was one CEP LOT and two home market LOTs, and that the CEP LOT was not the same as either home market LOT. *See id.* Commerce could not match CEP sales at the same LOT in the home market or make a LOT adjustment "because the differences in price between the CEP [LOT] and the home market [LOTs were] not quantifiable due to the lack of an equivalent CEP level of trade in the home market." *Id.* Commerce concluded that "[b]ecause the data available do not provide an appropriate basis to determine a [LOT] adjustment and the home market [LOTs] are at a more advanced stage of distribution than the CEP, [it] made a CEP offset for all such sales." *Id.* Moreover, contrary to NSK's contentions, Commerce concluded that no provision of the antidumping statute provides for a "partial" LOT adjustment "between two home market [LOTs] where neither level is equivalent to the level of the [United States] sale." *Final Results*, 62 Fed. Reg. at 54,057.

B. Contentions of the Parties

NTN contends that Commerce improperly denied a price-based LOT adjustment under § 1677b(a)(7)(A) for CEP sales made in the United States market at a LOT different from the home market sales. *See* NTN's Mem. Supp. Mot. J. Agency R. at 17–18. In particular, NTN argues, *inter alia*, that Commerce incorrectly determined NTN's CEP LOT because the agency failed to use the sale to the first unaffiliated purchaser in the United States to determine NTN's CEP LOT. *See id.* at 18–19. In other words, according to NTN, if Commerce had used the CEP starting price, that is, without any § 1677a(d) adjustment, to determine CEP LOT, NTN would have satisfied the statutory requirements for a LOT adjustment for its CEP sales. *See id.* at 18; NTN's Reply Br. at 25–31. In support of its position, NTN cites *Borden Inc. v. United States*, 22 CIT ____, 4 F. Supp. 2d 1221 (1998), where the court determined that Commerce's methodology of making a § 1677a(d) adjustment to CEP prior to the LOT analysis contravened the purpose of § 1677b(a)(7)(A). *See* NTN's Mem. Supp. Mot. J. Agency R. at 40–42; NTN's Reply Br. at 28–30 (both citing *Borden*, 4 F. Supp. 2d at 1241). NTN requests that the Court adopt the holding of *Borden* and remand the LOT issue to Commerce to determine NTN's CEP LOTs prior to any § 1677a(d) deductions and, afterwards, to grant NTN a price-based LOT adjustment for its CEP sales. *See id.* at 29–31.

NSK agrees with the manner in which Commerce determined LOT of its CEP for NV transactions. *See* NSK's Mem. Supp. Mot. J. Agency R. at 25. In particular, NSK agrees that Commerce properly used the CEP as adjusted for § 1677a(d) expenses prior to its LOT analysis. *See id.* at 25 n.12 (stating the Borden court "incorrectly ignored the statutory definition of CEP, which requires certain adjustments to starting price to

reach CEP"). NSK, however, argues that Commerce should have granted it a "partial" LOT adjustment. *See id.* at 24–29.

NSK first notes that Commerce found two LOTs in the home market, one corresponding to original equipment manufacturers ("OEM") sales and the other to after market ("AM") sales. *See id.* at 7. NSK also agrees that when Commerce matched CEP sales to home market OEM sales, Commerce correctly applied a CEP offset because there was no basis for quantifying a price-based LOT adjustment for CEP to OEM NV matches. *See id.* at 26. Further, NSK agrees that "Commerce correctly concluded there was no record information that would allow Commerce to quantify the downward price adjustment to adjust fully the AM NV [LOT] to the CEP [LOT]." *Id.* Nevertheless, NSK disagrees with Commerce's decision to apply a CEP offset when Commerce matched CEP sales to home market AM sales. In these situations, NSK argues that § 1677b(a)(7)(A) and the SAA direct Commerce to calculate a partial, price-based LOT adjustment to NV for CEP sales measured by the price differences between OEM and AM LOTs. *See id.* at 8, 26–27.

NSK notes that the statute directs Commerce to adjust NV for any difference between CEP and NV "'wholly or partly due to a difference in level of trade'" between CEP and NV. *Id.* at 26 (quoting § 1677b(a)(7)(A)). NSK also notes that § 1677b(a)(7)(B) indicates a CEP offset should only be used in the total absence of price-based LOT adjustments. *See id.* Accordingly, NSK claims that since there was evidence for quantifying price differences between OEM and AM LOTs, Commerce's failure to calculate a price-based LOT adjustment that partly accounted for such LOT differences violated the plain language of § 1677b(a)(7)(A). *See* NSK's Reply Mem. Supp. Mot. J. Agency R. at 10–11.

Commerce, in turn, argues that it properly determined the LOT for NTN's CEP sales after deducting expenses and profit from the price to the first unaffiliated purchaser in the United States pursuant to § 1677a(d) because § 1677b(a)(7)(A), which provides for a LOT adjustment, requires Commerce to compare CEP, not the "unadjusted" starting price of CEP, with NV. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 57–61. Commerce notes CEP is defined in § 1677a(b) as the price at which the subject merchandise is first sold (or agreed to be sold) in the United States as "adjusted" under § 1677a(d). *See id.* at 58. Commerce further asserts that the Court should not follow *Borden* because it is not based upon persuasive statutory analysis. *See id.* at 61–66. Commerce also claims that it properly denied a LOT adjustment for NTN's CEP sales because NTN failed to establish its entitlement to a LOT adjustment. *See id.* at 5, 66–70.

Commerce also argues that it properly denied a partial LOT adjustment and applied a CEP offset to NV for all of NSK's CEP transactions. *See id.* at 70–77. Contrary to NSK's reading of § 1677b(a)(7)(A), Commerce asserts that the statute only provides for a LOT price-based adjustment to NV based upon price differences in the home market

between the CEP LOT and NV LOT when the differences can be quantified. *See id.* at 4, 74–76. Commerce claims that the statute does not authorize a LOT price-based adjustment based upon different LOTs in the home market when the price difference between the CEP LOT sales and the home market LOT sales cannot be quantified, as NTN acknowledges in this case. *See id.*; *see also Final Results*, 62 Fed. Reg. at 54,057 (explaining that Commerce does not read into § 1677b(a)(7)(A)'s "wholly or partly" language the authority to make a LOT adjustment based on differences between two home market LOTs where neither level is equivalent to the level of the United States sale). Commerce, therefore, asserts that since it reasonably interpreted § 1677b(a)(7)(A), the Court should sustain its denial of a LOT adjustment and grant of a CEP offset for all of NSK's CEP transactions. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 76–77.

Torrington generally agrees with Commerce's positions, emphasizing that Commerce: (1) properly denied a LOT adjustment for NTN's CEP sales; (2) correctly made § 1677a(d) adjustments to the starting price of CEP prior to determining a LOT for NTN's CEP sales; and (3) reasonably interpreted § 1677b(a)(7)(A) as not providing for a "partial" LOT adjustment as contended by NSK. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 5, 27–29, 41–45. Torrington further argues that even if § 1677b(a)(7)(A) permits a partial LOT adjustment, NSK nevertheless failed to submit record evidence to show entitlement to such an adjustment. *See id.* at 45. Accordingly, Torrington contends that this Court should not disturb Commerce's reasonable interpretation of the statute as applied to the record evidence. *See id.*

C. Analysis

Under the first step of *Chevron*, the Court must ascertain whether the antidumping statute's plain language speaks to the precise question at issue. Here, 19 U.S.C. § 1677b(a)(7) specifically provides that to make a LOT adjustment to NV, Commerce must determine if there is "a difference in level of trade between the export price or constructed export price and the normal value." *Id.* In other words, Commerce must first calculate EP or CEP before performing its LOT analysis. Title 19, United States Code, § 1677a provides the following guidance for determining EP and CEP:

> (a) Export price
>
> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, *as adjusted under subsection (c) of this section.*
>
> (b) Constructed export price
>
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the

> account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, *as adjusted under subsections (c) and (d) of this section.*

Id. (emphasis added).[8]

Thus, the starting price under § 1677a(a) must be "adjusted under subsection (c)" of § 1677a to determine EP. Indeed, § 1677a(c)'s language clearly provides that subsection (c) adjustments must be made to the starting price used to "establish" EP. *See* 19 U.S.C. § 1677a(c) ("The price used to establish export price and constructed export price shall be—(1) increased by * * * and (2) reduced by"). Similarly, the starting price under § 1677a(b) must be "adjusted under subsections (c) and (d)" of § 1677a to determine CEP. Also, the language of § 1677a(c) as well as § 1677a(d) clearly provides that subsection (c) and (d) adjustments must be made to the starting price used to "establish" CEP. *See id.*; 19 U.S.C. § 1677a(d) ("For purposes of this section, the price used to establish constructed export price shall also be reduced by"); *see also AK Steel Corp. v. United States*, 203 F.3d 1330, 1333 (Fed. Cir. 2000) ("If CEP methodology is used, additional deductions are taken from the sales price to arrive at the U.S. Price."). The Court, therefore, finds that § 1677a unambiguously requires Commerce to make: (1) subsection (c) adjustments to § 1677a(a)'s starting price to determine EP; and (2) subsection (c) and (d) adjustments to § 1677a(b)'s starting price to determine CEP.

Accordingly, since the language of § 1677a is unambiguous in how to calculate EP and CEP, the Court declines to follow the rationale of *Borden*. *See generally Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) ("It is axiomatic that statutory interpretation begins with the language of the statute. If * * * the language is clear and fits the case, the plain meaning of the statute will be regarded as conclusive.") (citations omitted). Any imbalance that § 1677a's definitions of EP and CEP creates with respect to Commerce's LOT analysis when comparing NV with EP or CEP must be rectified by

---

[8] Although § 1677a does not specifically state that it applies to § 1677b(a)(7), the Court finds that both sections of "Part IV—General Provisions" of "Subtitle IV—Countervailing and Antidumping Duties" are to be read together. *See generally Freytag v. Comm'r*, 501 U.S. 868 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (citation and internal quotation marks omitted).

Congress because neither the Court nor Commerce may rewrite the statute.[9]

Further, Commerce's decision to deny NSK a partial, price-based LOT adjustment measured by price difference between home market OEM and AM sales was in accordance with law. There is no indication in § 1677b(a)(7)(A) that the pattern of price differences between two LOTs in the home market, absent a CEP LOT in the home market, justifies a LOT adjustment. Rather, Commerce's interpretation of § 1677b(a)(7)(A) as only providing a LOT adjustment based upon price differences in the home market between the CEP LOT and the NV LOT was reasonable, especially in light of the existence of the CEP offset to cover situations such as those at issue here.

VI. *Commerce's Recalculation of NTN's Home Market and United States Indirect Selling Expenses Without Regard to Level of Trade*

A. Background

In its preliminary calculations, Commerce had calculated NTN's United States indirect selling expenses without regard to LOTs. *See Final Results*, 62 Fed. Reg. at 54,055. NTN argued that Commerce should have recalculated NTN's United States selling expenses to reflect its reported indirect selling expense allocations based on LOT. *See id.* Torrington, in turn, contended that Commerce should reject NTN's indirect selling expense allocations based on LOT because they were distortive and unsubstantiated. *See id.*

Commerce responded that in the prior four reviews it determined that NTN's methodology for allocating its indirect selling expenses based on LOTs did not bear any relationship to the manner in which NTN incurred these United States selling expenses and its methodology led to distorted allocations. *See Final Results*, 62 Fed. Reg. at 54,055. Because Commerce found during this POR that NTN "did not provide record evidence to substantiate its claim that its indirect selling expenses are attributable to and vary by its reported levels of trade," the agency recalculated NTN's United States indirect selling expenses to represent such selling expenses for all United States sales. *Id.*

Commerce also recalculated NTN's home market indirect selling expenses without regard to LOT, but did not state its reasons for such a recalculation. *See* Antifriction Bearings from Japan—NTN Bearing Corporation (NTN), Final Results Analysis Mem. for the Seventh Administrative Review ("Commerce's Final Results Mem. for NTN")

---

[9] Indeed, in *AK Steel Corp. v. United States*, 203 F.3d 1330 (Fed. Cir. 2000), the United States Court of Appeals for the Federal Circuit opined in a related matter:

> Congress's intent to fully define EP and CEP without any delegation to Commerce is further evident when the sections are viewed in the context of the rest of the anti-dumping statute. It is common in the anti-dumping statute for Congress to leave decisions about how to make dumping calculations to Commerce's discretion because of its expertise. * * * Accordingly, if Congress had intended for Commerce to use its discretion to determine whether the use of CEP or EP was appropriate, it would have explicitly left that task to the agency as it did with other calculations in the statute.
>
> When Congress makes such a clear statement as to how categories are to be defined, neither the agency nor the courts are permitted to substitute their own definition for that of Congress, regardless of how close the substitute definition comes to achieving the same result as the statutory definition. The job of revising statutes is for Congress, not the agency or the courts.

Id. at 1340–41 (footnote omitted).

(Sept. 22, 1997) (Case No. A–588–804, Fiche 254, Frame 1, Proprietary Doc. 88, at 5).

B. Contentions of the Parties

Although recognizing that in *NTN*, 19 CIT at ____, 905 F. Supp. 1083, 1094–95 (1995), the Court decided against a LOT adjustment for NTN's indirect selling expenses because it failed to quantify the expenses at each LOT, NTN argues that it submitted evidence that establishes it incurred different selling expenses at different trade levels for this POR. *See* NTN's Mem. Supp. Mot. J. Agency R. at 14–16; NTN's Reply Br. at 19, 22. NTN also notes that Commerce verified and found no discrepancies with respect to NTN's home market selling expenses. *See* NTN's Mem. Supp. Mot. J. Agency R. at 15. In particular, NTN notes that Commerce verified that NTN undertakes different selling functions at each LOT depending upon the class of customer involved. *See id.*

NTN also asserts that it is inconsistent for Commerce to find that there were different LOTs in the United States and home markets for NTN's subject merchandise while simultaneously recalculating NTN's United States indirect selling expenses without regard to LOT. *See id.* at 16. NTN notes that Commerce has accepted NTN's methodology of allocating its United States indirect selling expenses based on LOT in previous reviews and even stated that NTN's "methodology prevents, rather than creates, certain distortions." NTN's Reply Br. at 21 (quoting *Tapered Roller Bearings, Finished and Unfinished from Japan; Final Results of Administrative Review*, 61 Fed. Reg. 57,629, 57,636 (Nov. 7, 1996)).

Accordingly, NTN argues that Commerce should have accepted its reported home market and United States indirect selling expenses based on LOT. NTN's Reply Br. at 19, 22. NTN requests that the Court remand the matter to Commerce and instruct it to recalculate NTN's margins by using NTN's reported indirect selling expense LOT allocations. *See id.*

Commerce responds that NTN's allocation methodology failed to reasonably quantify its United States indirect selling expenses at different trade levels. *See* Def.'s Mem. in Partial Opp'n to Pls.' Mot. J. Agency R. at 48. Commerce asserts that NTN only quantified the allocation itself and, therefore, the Court should sustain the agency's recalculation of NTN's United States indirect selling expenses. *See id.*

Commerce further argues that the mere fact that upon verification it found no discrepancies with respect to NTN's home market indirect selling expenses, does not mean that NTN established that these expenses were incurred at each LOT. *See id.* Moreover, Commerce argues that the fact it may have verified that NTN performed different selling functions depending upon the class of customer involved is insufficient by itself to justify a LOT adjustment for NTN's home market indirect selling expenses because a class of customer does not necessarily correspond to a LOT. *See id.* Commerce asserts, however, that since it did not state on the record its reasons for recalculating NTN's home market indirect sel-

ling expenses, the Court should remand the issue so the agency may articulate its reasons for the recalculation. *See id.*

Torrington supports Commerce and argues that NTN has not distinguished the current review from previous reviews in which the Court affirmed Commerce's recalculation of NTN's indirect selling expenses without regard to LOT. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 6, 29–33.

C. Analysis

The Court disagrees with NTN that it adequately supported its LOT adjustment claim for its reported United States indirect selling expenses. Although NTN purports to show that it incurred different selling expenses at different trade levels, a careful review of the record demonstrates that NTN's allocation methodology does not reasonably quantify the United States indirect selling expenses incurred at each LOT to support a LOT adjustment. *See NTN*, 19 CIT at ____, 905 F. Supp. at 1095; *NTN Bearing Corp. of Am. v. United States*, 23 CIT ____, ____, Slip. Op. 99–71, at ____ (July 29, 1999). Given that NTN had the burden before Commerce to establish its entitlement to a LOT adjustment, its failure to provide the requisite evidence compels the Court to conclude that it has not met its burden of demonstrating that Commerce's denial of the LOT adjustment was not supported by substantial evidence and was not in accordance with law. *See NSK*, 190 F.3d at 1330.

Accordingly, the Court denies NTN's remand request for recalculation of its margins using its reported United States indirect selling expense data. The Court, however, remands this matter to Commerce to articulate how the record supports its decision in the *Final Results* to recalculate NTN's home market indirect selling expenses without regard to LOT.

VII. *Constructed Export Price Profit Calculation without Regard to Level of Trade*

A. Background

In calculating CEP, Commerce must reduce the starting price used to establish CEP by "the profit allocated to expenses described in paragraphs (1) and (2)" of § 1677a(d). 19 U.S.C. § 1677a(d)(3). Under 19 U.S.C. § 1677a(f) (1994), the "profit" that will be deducted from this starting price will be "determined by multiplying the total actual profit by [a] percentage" calculated "by dividing the total United States expenses by the total expenses." *Id.* § 1677a(f)(1), (2)(A). Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions, and the cost of any further manufacture or assembly in the United States. Section 1677a(f)(2)(C) establishes a tripartite hierarchy of methods for calculating "total expenses." First, "total expenses" will be "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country" if Commerce

requested such expenses for the purpose of determining NV and CEP. *Id.* § 1677a(f)(2)(C)(i). If Commerce did not request these expenses, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(ii). If the data necessary to determine "total expenses" under either of these methods is not available, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(iii). "Total actual profit" is based on whichever category of merchandise is used to calculate "total expenses" under § 1677a(f)(2)(C). *See id.* § 1677a(f)(2)(D).

During this POR, NTN argued that profit levels differed by LOT and had an effect on prices and CEP profit and, therefore, Commerce should calculate CEP profit on a LOT-specific basis rather than for each class or kind of merchandise. *See Final Results*, 62 Fed. Reg. at 54,073. NTN reasoned that § 1677a(f)(2)(C) "expresses a preference for CEP profit to be calculated on the narrowest possible basis which * * * ensures more accurate results." *Id.*

Commerce rejected NTN's argument, concluding that: (1) "neither the statute nor the SAA requires [Commerce] to calculate CEP profit on bases more specific than the subject merchandise as a whole"; (2) basing the CEP-profit calculation on a LOT-specific basis "would add a layer of complexity to an already complicated exercise with no increase in accuracy"; and (3) "a subdivision of the CEP-profit calculation would be more susceptible to manipulation." *Id.* at 54,072; *see id.* at 54,073 (Commerce also relied on its more expansive explanation made in the sixth review of the AFBs at 62 Fed. Reg. 2081, 2125).[10]

B. Contentions of the Parties

NTN contends that Commerce erred by refusing to calculate CEP profit on LOT-specific basis. *See* NTN's Mem. Supp. Mot. J. Agency R. at 26. Highlighting the "narrowest category of merchandise" language of § 1677a(f)(2)(C)(ii) and (iii), NTN again argues that there is a clear statutory preference that profit be calculated on the narrowest possible basis. *See id.* at 26–27. Moreover, NTN claims that since CV profit is calculated by LOT and matching is by LOT, CEP profit should be calculated to account for differences in LOT. *See id.* at 27. NTN asserts that the mere fact that a calculation is difficult is not a valid reason to sacri-

---

[10] In the sixth AFB review, Commerce reasoned as follows:

> Neither the statute nor the SAA require us to calculate CEP profit on bases more specific than the subject merchandise as a whole. Indeed, while we cannot at this time rule out the possibility that the facts of a particular case may require division of CEP profit, the statute and SAA, by referring to "the" profit, "total actual profit," and "total expenses" imply that we should prefer calculating a single profit figure. NTN's suggested approach would also add a layer of complexity to an already complicated exercise with no guarantee that the result will provide any increase in accuracy. We need not undertake such a calculation (*see Daewoo Electronics v. International Union*, 6 F.3d 1511, 1518–19 (CAFC 1993)). Finally, subdivision of the CEP-profit calculation would be more susceptible to manipulation. Congress has specifically warned us to be wary of such manipulation of the profit allocation (*see* S. Rep. 103–412, 103d Cong., 2d Sess at 66–67).

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 Fed. Reg. 2081, 2125 (Jan. 15, 1997).

fice accuracy. *See id.* NTN further asserts that Commerce's speculation that an adjustment is susceptible to manipulation provides no grounds for rejecting an adjustment. *See id.* at 28. NTN, therefore, requests that the Court remand the issue to Commerce to calculate CEP profit on a LOT-specific basis. *See id.*

Commerce responds that it properly determined CEP profit without regard to LOT. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 93–98. Commerce notes, *inter alia*, that § 1677a(f) does not refer to LOT, that is, the statute does not require that CEP profit be calculated on a LOT-specific basis. *See id.* at 96. Commerce thereby argues that it does not have to consider a much narrower sub-category of merchandise such as one based on LOT. *See id.* In addition, Commerce asserts that even assuming that a narrower basis for the CEP-profit calculation is warranted in some circumstances, NTN has not provided any factual support for such a deviation from Commerce's standard methodology for calculating CEP profit. *See id.* at 97. Torrington generally agrees with Commerce's CEP-profit calculation. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 27–29.

C. Analysis

Section 1677a(f), as Commerce correctly notes, does not make any reference to LOT. Accordingly, the Court's duty under *Chevron* is to review the reasonableness of Commerce's statutory interpretation. *See IPSCO*, 965 F.2d at 1061 (quoting *Chevron*, 467 U.S. at 844).

Subsections (ii) and (iii) of the § 1677a(f)(C)'s "total expense" definition both refer to "expenses incurred with respect to the narrowest category of merchandise * * * which includes the subject merchandise." The term "subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25) (1994). The statute, therefore, clearly contemplates that, in general, the "narrowest category" will include the class or kind of merchandise that is within the scope of an investigation or review.

Accordingly, the Court finds that Commerce reasonably interpreted § 1677a(f) in refusing to apply a narrower subcategory of merchandise such as one based on LOT. The Court, moreover, agrees with Commerce's conclusion that "a subdivision of the CEP-profit calculation would be more susceptible to manipulation," a result that Congress specifically warned Commerce to prevent. *Final Results*, 62 Fed. Reg. at 54,073 (citing 62 Fed. Reg. at 2125 (Jan. 15, 1997) (citing, in turn, S. Rep. 103–412, 103d Cong., 2d Sess. at 66–67 (1994))). Finally, even if the Court were to assume that a narrower basis for calculating CEP profit would be justified under some circumstances, the Court agrees with Commerce that NTN failed to provide adequate factual support of how the CEP profit calculation was distorted by Commerce's standard methodology.

VIII. *Commerce's Denial of an Adjustment to NTN's United States Indirect Selling Expenses for Interest Allegedly Incurred in Financing Cash Deposits for Antidumping Duties*

A. Background

During the review, NTN claimed a downward adjustment to its reported United States indirect selling expenses for imputed interest expenses allegedly incurred in financing cash deposits for antidumping duties. *See Final Results*, 62 Fed. Reg. at 54,078. Commerce denied the adjustment and determined that such an interest offset to NTN's indirect selling expenses is inappropriate, whether based on actual interest expenses or an imputed amount allegedly associated with financing cash deposits. *See id.* at 54,079. Commerce thereby deducted the entire amount of NTN's reported indirect selling expenses, including all interest, from the CEP. *See id.*

Commerce noted that 19 U.S.C. § 1677a(d)(1), which provides for the deduction of certain selling expenses from CEP that were "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise," does not precisely define what constitutes a selling expense; instead, Congress has given Commerce discretionary authority to determine what such an expense encompasses. *See id.* Commerce acknowledged that in past reviews of the applicable antidumping duty orders, it determined that interest expenses incurred in financing antidumping duty cash deposits were not considered selling expenses and thereby allowed an offsetting, financing-cost adjustment to United States indirect selling expenses, "mainly to account for the opportunity cost associated with making a deposit (*i.e.*, the cost of having money unavailable for a period of time)." *Preliminary Results*, 62 Fed. Reg. at 31,569; *see Final Results*, 62 Fed. Reg. at 54,079. For this review, however, Commerce reconsidered its position and concluded that this offsetting financing-cost adjustment is inappropriate. *See id.*

Commerce found that while under the statute it may allow a limited exemption from deductions from United States price for antidumping duty cash deposits and legal fees associated with participation in an antidumping case, it found no basis for extending this exemption to interest expenses allegedly incurred in financing the cash deposits. *See id.* The agency reasoned that there is a distinction "between business expenses that arise from economic activities in the United States and business expenses that are direct, inevitable consequences of the dumping order." *Id.* Commerce determined that while cash deposits and legal fees are incurred solely as a result of the existence of an antidumping order, "[f]inancial expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping order." *Id.* In particular, Commerce explained that although it may be true that some import-

ers sometimes incur a cost if they borrow money in order to pay for cash deposits of antidumping duties, it is a fundamental principle that:

> 'money is fungible. If an importer acquires a loan to cover one operating cost, that may simply mean that it will not be necessary to borrow money to cover a different operating cost.' Companies may choose to meet obligations for cash deposits in a variety of ways that rely on existing capital resources or that require raising new resources through debt or equity. For example, companies may choose to pay deposits by using cash on hand, obtaining loans, increasing sales revenues, or raising capital through the sale of equity shares. In fact, companies face these choices every day regarding all their expenses and financial obligations. There is nothing inevitable about a company having to finance cash deposits and there is no way for [Commerce] to trace the motivation or use of such funds even if it were.

Id. (quoting *Preliminary Results,* 62 Fed. Reg. at 31,569). Commerce also noted that "the calculation of the dumping margins should not vary depending on whether a party has funds available to pay cash deposits or requires additional funds in the form of loans." *Preliminary Results,* 62 Fed. Reg. at 31,569.

Moreover, Commerce determined that it should not impute an amount for any interest costs that would theoretically be associated with financing actual cash deposits of antidumping duties. *Final Results*, 62 Fed. Reg. at 54,079. Commerce reasoned that "there is no real opportunity cost associated with paying cash deposits when the paying of such deposits is a precondition for doing business in the United States. * * * Companies cannot choose not to pay cash deposits if they want to import nor can they dictate the terms, conditions, or timing of such payments." *Id.*

B. Contentions of the Parties

NTN claims that Commerce's rationale for denying NTN's adjustment for interest expenses is flawed because irrespective of how a company opts to finance the cash deposits for antidumping duties, the amount of cash deposited will have to be made up by financing something else, a result that is a direct inevitable consequence of the antidumping duty order. *See* NTN's Mem. Supp. Mot. J. Agency R. at 37. NTN also asserts that if Commerce were to allow the interest expenses from cash deposits from prior reviews to affect the dumping margin calculations of present reviews, a never-ending cycle would follow that would prevent Commerce from ever revoking the antidumping duty order. *See id.* at 38.

Further, NTN notes that Commerce has repeatedly taken the position that interest expenses incurred in financing cash deposits of antidumping duties cannot be properly treated as indirect selling expenses and, therefore, has allowed for an interest-expense adjustment on antidumping duty cash deposits. *See id.* at 38 (citations omitted). NTN asserts that since it has relied on Commerce's prior methodology for such interest expenses, the holding of *Shikoku* dictates that Commerce would vio-

late "principles of fairness" if it were allowed to change its methodology for this POR. *See* NTN's Reply Br. at 9.

NTN also asserts that this Court has consistently upheld the interest-expense adjustment to indirect selling expenses when Commerce has granted it and has remanded to Commerce to allow the adjustment when the agency has denied it. *See* NTN's Mem. Supp. Mot. J. Agency R. at 38–39 (citations omitted). In particular, NTN argues that *Federal-Mogul Corp. v. United States*, 20 CIT 1438, 1440–41, 950 F. Supp. 1179, 1182–83 (1996), clearly refutes Commerce's decision to deny NTN's interest-expense adjustment. *See* NTN's Mem. Supp. Mot. J. Agency R. at 39. In particular, NTN notes the court in *Federal-Mogul* found that there was no support for a domestic party's "assertion that any expense related to antidumping proceedings is automatically a selling expense related to the sale of the subject merchandise. Indeed, pursuant to the rationale of [*Daewoo Elecs. Co. v. United States*, 13 CIT 253, 270, 712 F. Supp. 931, 947 (1989)], such expenses are not necessarily selling expenses." NTN's Reply Br. at 8 (quoting *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183). NTN points out that the court in *Federal-Mogul* found that, similar to the *Daewoo* court's holding that legal expenses related to antidumping proceedings are not selling expenses, the interest expenses at issue did not qualify as selling expenses because they were not related to the sale of merchandise, but to NTN's participation in the antidumping proceeding. *See id.* NTN also notes that the court in *Federal-Mogul* held that "'the interest NTN paid for antidumping duty deposits is not a selling expense and, thus, should be excluded from NTN's U.S. indirect selling expenses.'" NTN's Reply Br. at 8 (quoting *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183). Moreover, NTN notes that in *NSK Ltd. v. United States*, 21 CIT ____, ____, 969 F. Supp. 34, 55 (1997), the Court reaffirmed its decision in *Federal-Mogul* to allow NTN's adjustment for interest expenses on antidumping duty cash deposits. *See* NTN's Mem. Supp. Mot. J. Agency R. at 40. NTN contends that since there has been no change in law, the issue should be remanded to Commerce to allow NTN to offset its United States indirect selling expenses for imputed interest payments incurred in financing cash deposits. *See id.* at 12, 40; NTN's Reply Br. at 9.

Commerce argues that its decision to deny the offset was within its discretion. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 100. Commerce also argues that it may change its methodology if it presents a reasonable basis for departing from its previous practice. *See id.* at 100–01. Further, Commerce contends that the interest expenses allegedly incurred with financing antidumping duty cash deposits are ordinary interest expenses and, therefore, not deductible from United States indirect selling expenses. *See id.* at 101–02.

Torrington asserts that Commerce reasonably denied the offset, because allowing United States selling expenses to be reduced in the manner claimed by NTN encourages dumping. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 18–19. Specifically, Torrington argues that

the more a company dumps its merchandise in the United States, the alleged interest expenses on antidumping duty cash deposits will become greater. *See id.* at 19. Torrington contends that as the interest expense becomes greater, so does the offset to its reported United States indirect selling expenses and, indeed, if the offset becomes sufficiently large, dumping margins could disappear over time. *See id.* Torrington also argues that there is no evidence that NTN actually obtained loans for the purpose of posting cash deposits and, therefore, there is no factual basis for the adjustment. *See id.*

C. Analysis

Although NTN correctly points out that interest expenses incurred on financing antidumping cash deposits are not "selling expenses," *see Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183, the Court disagrees that *Shikoku*, 16 CIT at 386–87, 795 F. Supp. at 420, prevents Commerce in this review from altering its methodology of making adjustments to United States indirect selling expenses. This Court has noted that "Commerce may, in certain circumstances, reasonably change its methodology from review to review." *Timken Co. v. United States*, 21 CIT ____, ____, 989 F. Supp. 234, 250 (1997) (allowing Commerce to alter its methodology with respect to interest expenses incurred for financing cash deposits).

Consequently, since 19 U.S.C. § 1677a(d) does not provide clear guidance with respect to the adjustment, the issue for the Court is whether Commerce's interpretation of the statute was reasonable. The Court finds that Commerce reasonably interpreted the statute by concluding that financing expenses incurred on antidumping duty cash deposits are not an inevitable consequence of the antidumping duty order and that, with respect to imputed interest costs, there is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States. Further, the Court finds that NTN failed to provide any evidence on record that supported it actually or approximately incurred the alleged interest expenses on antidumping duty cash deposits. Commerce acted rationally in denying NTN's claimed interest-expense adjustment and, therefore, Commerce's determination is sustained.

IX. *Inclusion of Sample Transactions in NTN's United States Sales Database*

A. Background

In *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), four months prior to Commerce's publication of the *Final Results*, the United States Court of Appeals for the Federal Circuit ("CAFC") concluded that "the term 'sold' * * * requires both a transfer of ownership to an unrelated party and consideration." *Id.* at 975. The CAFC specifically determined that the samples NSK had given to potential customers at no charge and with no obligation lacked consideration. *See id.* Moreover, the CAFC found that "[b]ecause NSK's [free] sample sales

did not constitute 'sales,' they should not have been included in calculating United States price." *Id.*

During this review, Commerce sent a questionnaire on June 19, 1996 requiring all respondents to (1) identify any transactions which they claimed involved sample or prototype sales, and (2) provide the following additional information:

> (1) Describe how the order for these sales were communicated.
> (2) What documents are available to demonstrate that these sales are samples or prototypes?
> (3) Did the customer in question purchase these particular items before the date of the claimed sample sale? If so, how many were purchased?
> (4) Contrast the prices and quantities involved in these purchases with normal sales of these items, if any, to other customers and subsequent sales to the same customers.
> (5) What was the ultimate disposition of these bearings? Did title pass to the recipient of the merchandise? Were the bearings tested and destroyed during trial application?

Commerce's Questionnaire, Sec. B (Field No. 49, home or third-country market), Sec. C (Field No. 55, United States market): Samples and Prototypes, at V–8, V–9. Commerce warned NTN that (1) if it failed to accurately provide the information requested within the time period, Commerce would proceed with an appraisement based on the facts available, and (2) if NTN failed to cooperate with Commerce by not complying to the best of its ability with the request for information, Commerce would use information adverse to NTN's interest in conducting its dumping analysis. *Id.* (General Instructions).

On September 9, 1996, NTN responded to Commerce's Questionnaire regarding United States market sample sales as follows: (1) customers requested sample sales; (2) sample sales were reported with a code of "S" and other sales as "X"; (3) the sale was entered as a sample and recorded as a sample on order forms and invoices; (4) due to the quantity of sample sales and limited time to respond, NTN did not have time to review each model's purchase history; and (5) "NTN is the manufacturer of all the merchandise sold as samples."[11] NTN's Questionnaire Resp., Sec. C, at C–43 (Case No. A–588–804, Fiche 202, Frame 90, Proprietary Doc. 24). NTN further responded that certain information concerning sample sales regarding Commerce's questions three and four was irrelevant. *See id.* at C–44.

Commerce sent a supplemental questionnaire to NTN requesting additional information, however, none of the questions appear to have concerned NTN's reported sample sales. *See* Commerce's Supplemental Questionnaire (Dec. 2, 1996) (Case No. A–588–804, Fiche 85, Frame 26, Pub. Doc. 136). Similarly, none of NTN's responses to the supplemental questionnaire addressed the samples. *See* NTN's Supplemental Ques-

[11] Although NTN's responses to Commerce's request for information were bracketed as proprietary information, the Court notes that the responses, as paraphrased in this opinion, do not compromise proprietary information. Quoted response number five (5) was not bracketed as proprietary information.

tionnaire Resp. (Dec. 19, 1996) (Case No. A–588–804, Fiche 89, Frame 28, Pub. Doc. 149). Commerce later verified that NTN's records identified certain sales as samples and that the sale price for a sample was determined by a salesperson. *See* Commerce's Verification Report for NTN (May 8, 1997) (Case No. A–588–804, Fiche 96, Frame 47, Pub. Doc. 180, at 5).

Subsequently, NTN requested that Commerce exclude its sample sales from its United States sales database pursuant to *NSK*, 115 F.3d at 975. Commerce rejected NTN's request, noting that although it would follow *NSK* and "exclude sample transactions, [that is,] transactions for which a respondent has established that there is either no transfer of ownership or no consideration, from the dumping [margin] calculations," it would not automatically exclude from its dumping margin analysis "any transaction to which a respondent applies the label 'sample.'" *Final Results*, 62 Fed. Reg. at 54,069. Rather, Commerce noted that the party in possession of the needed information has the burden of producing that information for an exclusion. *See id.* With respect to NTN's samples-exclusion claim, Commerce determined as follows:

> [NTN] did not answer our questions regarding the purchase history of parties receiving samples. [NTN] also did not answer our questions regarding the prices and quantities involved in sample sales. Rather, [NTN] stated that the information is irrelevant. The answers to these questions would have aided us in determining whether [NTN] received a bargained-for exchange from [its United States] customers. Lacking knowledge of the details of these transactions, we cannot conclude that [NTN] received no consideration for these alleged samples. In other words, because [NTN] impeded our investigation of these transactions, we determined that an adverse inference is appropriate. Therefore, for these final results, we have included [NTN's] sample sales in [its United States] sales database.

Id.

B. Contentions of the Parties

NTN contends that Commerce acted contrary to *NSK*, 115 F.3d at 975, when it refused to exclude NTN's reported zero-price sample sales from its United States sales database. *See* NTN's Mem. Supp. Mot. J. Agency R. at 23. NTN asserts that sample sales, by their very nature, lack consideration and it in fact received no consideration for such sales. *See id.* Moreover, NTN argues that its response questionnaire and related correspondence (1) provided complete sales data for all United States transactions in its United States sales database, including zero-priced transactions, and (2) fully answered all of Commerce's questions regarding its United States sales. *See* NTN's Reply Br. at 11–12. NTN also argues that none of the information requested by these questions was mentioned by the CAFC in *NSK*. *See id.* at 12. NTN requests that the issue be remanded to Commerce to exclude NTN's zero-priced sample sales from its United States sales database. *See* NTN's Mem. Supp. Mot. J. Agency R. at 23.

Commerce's notes that only NTN possesses the information concerning the purchase history of its alleged samples, including the price and quantity of any prior or subsequent purchases of these products by the same or other consumers. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 86. Commerce asserts that since NTN withheld that information, it failed to meet its burden to show that it received no consideration for the alleged samples at issue. *See id.* Further, Commerce contends that NTN cannot be excused from responding to the agency's questions because, in NTN's view, certain information is irrelevant. *See id.* Rather, Commerce claims that it, not NTN, must determine the relevancy of its questions. *See id.*

Commerce, therefore, contends that since NTN withheld the requested information, and the record did not contain information that Commerce could use to perform its dumping margin calculation, Commerce properly relied on "facts otherwise available" to fill in the gaps for its calculation. *See id.* (citing 19 U.S.C. § 1677e(a) (1994)). Also, Commerce contends that since NTN failed to cooperate to its best of its ability with Commerce's request for information, Commerce properly determined to apply an adverse inference, that is, the information would indicate that NTN did receive consideration for its alleged samples. *See id.* at 86–87 (citing 19 U.S.C. § 1677e(b)). Accordingly, Commerce argues that its decision to include NTN's alleged sample sales in NTN's United States database is based upon substantial evidence and in accordance with law. *See id.* at 87.

Torrington agrees with Commerce's findings, contending that the mere absence of a monetary price does not necessarily establish a lack of consideration. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 26. Moreover, Torrington asserts that since Commerce did not have information that NTN's sample sales were free of broader forms of consideration, Commerce properly concluded that it did not have the data to accept NTN's claim that such sales were in fact without consideration. *See id.* Torrington additionally asserts that respondents, such as NTN, who choose not to provide the requested information because they determine that the requested data is not legally relevant do so at their own peril. *See id.*

C. Analysis

The antidumping statute mandates that Commerce use "facts otherwise available" (commonly referred to as "facts available") if "necessary information is not available on the record" of an antidumping proceeding. 19 U.S.C. § 1677e(a)(1) (1994). In addition, Commerce may use facts available where an interested party or any other person: (1) withholds information that has been requested by Commerce; (2) fails to provide the requested information by the requested date or in the form and manner requested, subject to 19 U.S.C. § 1677m(c)(1), (e); (3) significantly impedes an antidumping proceeding; and (4) provides information that cannot be verified as provided in section 19 U.S.C. § 1677m(i). *Id.* § 1677e(a)(2)(A)–(D). Section 1677e(a) provides, however, that the use

of facts available shall be subject to the limitations set forth in 19 U.S.C. § 1677m(d) (1994).

Section 1677m, which was enacted as part of the URAA, is "designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with [Commerce]." *Borden*, 22 CIT at ____, 4 F. Supp. 2d at 1245. Section 1677m(d), entitled "[d]eficient submissions," provides that if Commerce determines that a response to a request for information does not comply with the request, the agency shall promptly inform the person submitting the response of the deficiency and permit that person an opportunity to remedy or explain the deficiency. If the remedial response or explanation provided by the party is found to be "not satisfactory" or untimely, Commerce may, subject to § 1677m(e), disregard "all or part of the original and subsequent responses" in favor of facts available. *Id.* § 1677m(d). Section 1677m(e) states that Commerce may not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all of Commerce's requirements if: (1) the information is submitted within the applicable deadlines; (2) "the information can be verified"; (3) "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"; (4) the party establishes that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce concerning the information; and (5) Commerce can use the information without undue difficulties. *See Borden*, 22 CIT at ____, 4 F. Supp. 2d at 1245 ("Subsection (e) may require use of the respondent's information notwithstanding that a remedy or explanation is unsatisfactory."). Also, § 1677m(c)(1) provides that if an interested party promptly informs Commerce that it is having difficulties submitting the information in the requested form and manner, Commerce may modify its request "to the extent necessary to avoid imposing any unreasonable burden on that party" in providing such information.

Once Commerce determines that use of facts available is warranted, § 1677e(b) permits Commerce to apply an "adverse inference" if it can find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." Such an inference may permit Commerce to rely on information derived from the petition, the final determination, a previous review or any other information placed on the record. *See* 19 U.S.C. § 1677e(c) (1994). When Commerce relies on information other than "information obtained in the course of the investigation or review, [Commerce] shall, to the extent practicable, corroborate the information from independent sources that are reasonably at [its] disposal." *Id.*

However, in order to find that a party "has failed to cooperate by not acting to the best of its ability," it is not sufficient for Commerce to merely assert this legal standard as its conclusion or repeat its finding concerning the need for facts available. *See Borden*, 22 CIT at ____, 4 F. Supp. 2d at 1246 ("Here, the Department did not make the required

additional finding that [respondent] had failed to act to the best of its ability. In essence, it simply repeated its 19 U.S.C. § 1677e(a)(2)(B) finding, using slightly different words * * *.") (citation omitted); *Ferro Union, Inc. v. United States*, 22 CIT ___, ___, 44 F. Supp. 2d 1310, 1329 (1999) ("Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse inference."). Rather, to be supported by substantial evidence, Commerce must clearly articulate (1) "why it concluded that a party failed to comply to the bests of its ability prior to applying adverse facts," and (2) "why the absence of this information is of significance to the progress of [its] investigation." *Ferro*, 22 CIT at ___, 44 F. Supp. 2d at 1331.

Although in the first request for information Commerce warned NTN that any lack of response will result in use of facts available to fill in gaps in the record, the *Final Results* do not clarify (1) whether NTN was given prompt notice of the deficiency regarding the sample sales data and given the opportunity to remedy the deficiency, or (2) even if NTN provided a remedial response, whether Commerce determined that such a response was not satisfactory or untimely, as required by 19 U.S.C. § 1677m(d). A review of the record, as noted, indicates that Commerce's supplemental questionnaire did not request additional information regarding NTN's reported sample sales. *See* Commerce's Supplemental Questionnaire (Dec. 2, 1996). Although Commerce asserted in its brief that NTN met the requirements of 19 U.S.C. § 1677e(a)(2)(A)–(C), *see* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 82–87, the Court cannot defer to this *post hoc* rationalization as a basis to uphold Commerce's decision to use facts available because such a decision must be sustained, if at all, on the same basis as the reasoning articulated in the final determination itself, *see Hoogovens Staal BV v. United States*, 24 CIT ___, ___, 86 F. Supp. 2d 1317, 1331 (Jan. 21, 2000) (holding that "a reviewing court must evaluate the validity of an agency's decision on the basis of the reasoning presented in the decision itself. An agency determination 'cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *.'") (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept * * * counsel's *post hoc* rationalizations for agency action; * * * an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").[12] Further, even if the Court were to assume that Commerce met § 1677e(a)'s criteria for using facts available, the Court notes that Com-

---

[12] Indeed, the Supreme Court has opined:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499 (1935)).

merce did not articulate in the *Final Results* whether it made any "additional findings" that NTN had failed to act to the best of its ability before applying an adverse inference under § 1677e(b).

The Court, however, agrees with Commerce's finding that it should not automatically exclude from its dumping margin analysis "any transaction to which a respondent applies the label 'sample.'" *Final Results*, 62 Fed. Reg. at 54,069. In determining whether to exclude samples from the sales database, as Commerce correctly noted, it must "examine the information on record to determine whether the recipients of the samples have undertaken actual obligations to purchase AFBs from the provider of the free bearings or whether the recipients remained free to purchase bearings of their own accord." *Id.* This approach is clearly consistent with the CAFC's decision in *NSK*, 115 F.3d at 973–75, where the appellate court determined that a foreign manufacturer's AFB "samples given to potential customers at no charge lacked consideration [because] * * * there is no evidence that potential customers had any obligation regarding samples received from [the manufacturer]. These potential customers were free to transact with [the manufacturer] based solely on their whim." *See id.* at 975 (noting that "[w]hen the promisor may choose to perform based solely on whim, then the promise will not serve as consideration") (citing 3 Williston on Contracts, § 7:7 at 18–19 (4th ed. 1992))). The CAFC explained that "[c]onsideration generally requires a bargain-for exchange," *see id.* (citing 3 Williston on Contracts, § 7:2 at 89 (4th ed. 1992)), and also noted that a "sale" is defined as " 'the act of selling: a contract transferring the absolute or general ownership of property from one person to another for a price (as a sum of money or any other consideration).' " *See id.* at 974 (quoting *Webster's Third New International Dictionary* 2003 (1986)). In others words, as Commerce accurately noted in the *Final Results*, consideration, or "price," is not necessarily limited to a "sum of money." *See* 62 Fed. Reg. at 54,069 (stating that Commerce would not limit its "review of consideration to the payment of a monetary price for the sample products").

Accordingly, although NTN argues that none of Commerce's questions in its first request for information were mentioned by the CAFC in *NSK*, 115 F.3d at 973–76, the Court finds that Commerce may formulate questions that reasonably ascertain whether there was a lack of consideration or transfer of ownership. Also, the Court notes that a respondent still maintains the burden of showing that there is either no consideration or no transfer of ownership to an unrelated party in order to exclude the sample sales from the dumping margin analysis. *See generally Timken Co. v. United States*, 11 CIT 786, 804, 673 F. Supp. 495, 513 (1997) (stating that Commerce "acts reasonably in placing the burden of establishing adjustments on a respondent that seeks the adjustments and that has access to the necessary information").

Nevertheless, in light of the considerable uncertainty left by the *Final Results*, the Court cannot conclude that Commerce's use of adverse

facts available was warranted under 19 U.S.C. § 1677e(a). The Court, therefore, remands the issue to Commerce to clarify how it complied with the statutory framework of 19 U.S.C. §§ 1677e, 1677m for using facts available and applying an adverse inference. If Commerce determines that it conformed with the statutory framework, Commerce must include NTN sample sales in its United States sales database because the Court notes that NTN specifically admitted it "sold" rather than gave away samples. *See* NTN's Questionnaire Resp., Sec. C, at C–43 ("NTN is the manufacturer of all the merchandise sold as samples."). If, however, in the remand results Commerce determines it did not adhere to all of the statutory prerequisite conditions, Commerce must give NTN the opportunity to remedy or explain any deficiency regarding its alleged sample sales.

X. *Commerce's Adjustments to NTN's Cost of Production and Constructed Value*

A. Background

During the POR, NTN purchased certain components from an affiliated supplier that were used in the manufacture of ball and cylindrical roller bearings. *See* Commerce's Final Results Mem. for NTN at 5. NTN's affiliated producer submitted COP data for certain components sold to NTN. *See* Affiliated Producer's Letter to Commerce (Sept. 9, 1996) (Case No. A–588–804, Fiche 208, Frame 1, Proprietary Doc. 25). Commerce found that "[s]ome of the components NTN purchased from * * * [the] affiliated supplier * * * were transferred at prices below the cost of production." Commerce's Final Results Mem. for NTN at 5. Because Commerce determined that the record was unclear as to which bearing models NTN used the purchased components in, Commerce was unable to adjust NTN's COP and CV data on a model-specific basis. *See id.* Therefore, using "facts otherwise available," Commerce calculated the average percentage difference between the transfer price and the cost for the components sold to NTN by its affiliated supplier. *See id.* at 5–6. Commerce then adjusted NTN's COP and CV upward by this average percentage difference. *See id.* at 6; *Final Results*, 62 Fed. Reg. at 54,065.

B. Contentions of the Parties

NTN argues Commerce's adjustment to NTN's COP and CV data was contrary to law because Commerce resorted to facts available and made an adverse inference without giving NTN the opportunity to provide the data Commerce determined was lacking from the record. *See* NTN's Mem. Supp. Mot. J. Agency R. at 19. Specifically, NTN asserts that Commerce should not have resorted to facts available because: (1) NTN fully responded to Commerce's requests for information and that Commerce at no time indicated that NTN's data was unclear or insufficient, that is, Commerce never asked for clarification of the information NTN submitted, *see id.* at 20; and (2) citing subsections (1) and (2) of 19 U.S.C. § 1677e(a), "NTN did not withhold information, fail to provide informa-

tion by the deadline or in the manner requested, or impede the investigation in any manner," *id.* at 21. NTN also notes that Commerce may only make an adverse inference when a "party has failed to cooperate by not acting to the best of its ability." *Id.* at 22 (quoting § 1677e(b)). NTN, therefore, asserts that since Commerce never asked for any additional information or clarification of the data which was submitted concerning the affiliated supplier's inputs, Commerce is prohibited from making an adverse inference and applying it to all of NTN's COP and CV data. *See id.* Accordingly, NTN requests that the Court remand the issue and order Commerce to use NTN's submitted COP and CV data. *See* NTN's Reply Br. at 25.

Commerce concedes in its brief that NTN did not meet any of the elements under paragraph (2) of the facts available provision, § 1677e(a), that is, "NTN did not withhold information, fail to provide information by the deadline specified or in the manner requested, or impede the investigation in any manner." *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 79. Nevertheless, Commerce notes that NTN "overlook[ed] paragraph '(1)' of facts available provision, which mandates the use of facts otherwise available "'if the necessary information is not available on the record.'" *Id.* (quoting § 1677e(a)(1)). Commerce argues that when it found the necessary information was not available on the record, it decided to use other information on the record to reflect the fact that NTN purchased certain components from an affiliated supplier that were transferred at prices below the COP. *See id.* at 81. Commerce explained that "the other information on record allowed [it] to adjust NTN's COP and CV without having to reject NTN's reported information in its entirety." *See id.*

Further, Commerce asserts that it did not "determine to make an adverse inference in choosing what information to use as facts available." *Id.* Rather, Commerce reasoned "given that the necessary information was not available on record, [it] used other information to address the problem with NTN's supplier's transfer prices." *Id.* Commerce, therefore, maintains that "[u]nder these circumstances, [its] use of facts available was reasonable." *Id.*

Torrington argues that Commerce properly adjusted all of NTN's COP and CV data for ball and cylindrical roller bearings because "NTN failed to make the record clear at its own peril." Torrington's Resp. to Pls.' Mots. J. Agency R. at 37. Torrington notes that this Court emphasized in *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 797 F. Supp. 1020 (1992), that "'[u]ltimately it is the respondent's responsibility to make sure that [Commerce] understands, and correctly uses, any information provided by the respondent." *Id.* at 36 (quoting *Neuweg*, 16 CIT at 728, 797 F. Supp. at 1024). Torrington asserts that since NTN "knew what models reported incorporated the purchased components" from the affiliated supplier, and since NTN "knew that Commerce would compare transfer prices and actual costs as to such

components, * * * the failure to identify those models incorporating the purchased components must be charged to NTN, not to Commerce." *Id.*

NTN replies that the facts of this case are distinguishable from *Neuweg* because Commerce in that case gave the respondent notice of Commerce's problems with the respondent's submitted information at a disclosure conference soon after the publication of the preliminary results. *See* NTN's Reply Br. at 23 (citing *Neuweg*, 16 CIT at 728, 797 F. Supp. at 1024). Here, NTN notes that Commerce did not provide any notice and, therefore, it is inequitable to punish NTN for Commerce's failure to request information. *See id.*

C. Analysis

Although Commerce relies on paragraph (1), not (2), of § 1677e(a) for using facts available, the section requires that Commerce meet the requirements of § 1677m(d) before resorting to facts available. Section 1677m(d), as noted earlier, states that if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the respondent submitting the response of the deficiency and permit the respondent an opportunity to remedy or explain the deficiency.

In this case, the Court finds that the *Final Results* do not clearly articulate whether NTN was provided with such notice and the opportunity to provide a remedial response regarding which ball and cylindrical roller bearing models the purchased components were used in by NTN. Since there appears to be a lack of § 1677m(d) notice, the Court agrees with NTN that this case is distinguishable from *Neuweg*. Accordingly, the Court remands the issue to Commerce to clarify whether NTN was provided with notice and opportunity to respond pursuant to § 1677m(d).

XI. *Commerce's Inclusion of NTN's Alleged Sample Sales and Sales with Abnormally High Profits in the Normal Value Calculation*

A. Background

Commerce is required to base its NV calculation upon "the price at which the foreign like product is first sold * * * in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). NTN contended during the review that Commerce, in calculating NV, should have excluded sales with "abnormally high" profits because they were outside of the ordinary course of trade. *See Final Results*, 62 Fed. Reg. at 54,065. Commerce rejected NTN's contention, explaining as follows:

> [N]o respondent has adequately shown that profits earned were aberrational or abnormal or otherwise outside the ordinary course of trade. As in past reviews, the fact that a respondent identified sales as having abnormally high profits does not necessarily render such sales outside the ordinary course of trade. * * * [I]n order to determine that profits are abnormally high, there must be certain unique or unusual characteristics related to the sales in question. Verification of the designation of certain sales as having abnormally high profits merely proves that the respondent identified sales as

> having abnormally high profits in its own records. This evidence does not indicate that such sales were made outside the ordinary course of trade for purposes of calculating NV in these reviews.

See id. at 54,065–66.

B. Contentions of the Parties

In response, NTN argues that Commerce's failure to exclude NTN's sales with unusually high profits from the NV calculation, despite NTN providing sufficient evidence on record indicating that these sales were outside of the ordinary course of trade, was inconsistent with 19 U.S.C. § 1677b(a)(1)(B), the SAA and the proposed regulation 19 C.F.R. § 351.102(b) (61 Fed. Reg. 7308, 7353 (Feb. 27, 1996)), all which clearly instruct Commerce to make such an exclusion. *See* NTN's Mem. Supp. Mot. J. Agency R. at 10–11, 23–26; NTN's Reply Br. at 12–17. NTN also argues, for the first time on appeal, that Commerce erred in including its home market sample sales in the calculation of NV because facts on the record support that the sales were made outside of the ordinary course of trade. *See* NTN's Mem. Supp. Mot. J. Agency R. at 25–26. NTN, therefore, requests that its sales with abnormally high profits and samples sales be disregarded in the calculation of NV. *See id.* at 26.

Commerce properly exercised its discretion in rejecting NTN's argument that Commerce must disregard sales with abnormally high profits as sales not in the ordinary course of trade because "NTN failed to adequately show that profits earned were 'aberrational or abnormal or otherwise outside of the ordinary course of trade.' " Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 91 (quoting *Final Results*, 62 Fed. Reg. at 54,065). Commerce further asserts that the Court should reject NTN's request to exclude sample sales from the NV calculation because (1) NTN failed to raise the claim at the administrative level; or (2) in the alternative, if NTN is not required to exhaust its administrative remedies, NTN failed to demonstrate that the samples were not sold in the ordinary course of trade. *See id.* at 92–93.

Torrington claims that Commerce properly rejected NTN's request to exclude alleged highly profitable sales and sample sales from the NV calculation because (1) a higher profit on a particular sale does not establish that a sale is outside the ordinary course of trade, and (2) NTN failed to show that the contested sales were not in ordinary course of trade. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 27.

C. Analysis

The term "ordinary course of trade" is defined as:

> the conditions and practices which, for a reasonable period of time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. [Commerce] shall consider the following

> transactions, *among others*, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title.
> (B) Transactions disregarded under section 1677b(f)(2) of this title.

19 U.S.C. § 1677(15) (1994) (emphasis added). Although § 1677b(b)(1)'s below-cost sales and § 1677b(f)(2)'s affiliated party transactions are clearly outside the ordinary course of trade, the "among others" language of § 1677(15) clearly indicates that transactions in subsection (A) and (B) are not inclusive. Indeed, the SAA provides that aside from §§ 1677b(b)(1), (f)(2) transactions:

> Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

SAA at 834. The SAA also provides that "[o]ther examples of sales that Commerce could consider to be outside the ordinary course of trade include sales of off-quality merchandise, sales to related parties at non-arm's length prices, and sales with abnormally high profits." *Id.* at 839–40. Thus, Commerce has the discretion to interpret § 1677(15) to determine which sales are outside the ordinary course of trade, such as sales involving aberrational prices and abnormally high profits. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT ____, ____, 15 F. Supp. 2d 807, 830 (1998) ("Congress granted Commerce discretion to decide under what circumstances highly profitable sales would be considered to be outside of the ordinary course of trade."); *cf. Koenig & Bauer-Albert AG v. United States*, 22 CIT, ____, ____, 15 F. Supp. 2d 834, 850 n.8 (1998) (noting that although Commerce has the discretion to decide under what circumstances highly profitable sales are outside of the ordinary course of trade, "Commerce may not impose this requirement arbitrarily, however, nor may Commerce impose impossible burdens of proof on claimants.") (citing *NEC Home Elecs. v. United States*, 54 F.3d 736, 745 (Fed. Cir. 1995) (holding that burden imposed to prove a LOT adjustment was unreasonable because claimant could, under no practical circumstances, meet the burden))).

In this case, the Court finds Commerce's decision to require additional evidence demonstrating that sales with higher profits were outside of the ordinary course of trade before excluding such sales from the NV calculation was a reasonable exercise of its discretion. The record reflects

that NTN did not provide any evidence that supports its claim that the disputed sales had abnormally high profits, that is, they were extraordinary for the market in question. With respect to excluding NTN's home market sample sales from the NV calculation, although, contrary to Commerce's assertion, NTN raised the issue below, *see* NTN's Case Br. at 2–3 (July 1, 1997) (Case No. A–588–804, Fiche 99, Frame 1, Pub. Doc. 204), the Court finds NTN similarly failed to show that the sales were outside the ordinary course of trade.

XII. *Commerce's Exclusion of Certain NTN Home Market Sales to Affiliated Parties from the Normal Value Calculation*

A. Background

During the POR, NTN made home market sales to affiliated and unaffiliated parties. In its preliminary analysis, Commerce conducted an arm's length-test to determine whether NTN's affiliated party sales could be used for purposes of calculating NV. *See* Commerce's Preliminary Results Analysis Mem. for NTN (June 2, 1997) (Case No. A–588–804, Fiche 97, Frame 48, Pub. Doc. 184); *see generally* SAA at 827 ("Commerce will * * * ignore sales to affiliated parties which cannot be demonstrated to be at arm's length prices for purposes of calculating normal value."). Specifically, Commerce compared NTN's home market selling prices to affiliated and unaffiliated parties for all classes and kinds of merchandise. *See id.* Commerce, in accordance with 19 U.S.C. § 1677b(f)(2), "disregarded sales of bearings to certain affiliated parties for certain classes or kinds of merchandise because [it] found that the net price of these products, when sold to these affiliated parties, was, on average, less than when these products were sold to unaffiliated parties." *Id.* Commerce stated that it "used sales to affiliated customers only where [it] determined that such sales were at arm's-length prices, *i.e.*, at prices comparable to prices at which the firm sold identical merchandise to unrelated customers." *Preliminary Results*, 62 Fed. Reg. at 31,570.

B. Contentions of the Parties

NTN argues that Commerce erred in applying the arm's-length test when it refused to use certain NTN sales to affiliated parties in the NV calculation. *See* NTN's Mem. Supp. Mot. J. Agency R. at 42. NTN asserts that Commerce should have examined factors other than price in determining whether affiliated and unaffiliated sales were comparable before disregarding NTN's affiliated party sales from the NV calculation. *See id.* at 42–45; NTN's Reply Br. at 33–35.

Commerce argues that pursuant to 19 C.F.R. § 353.38(c)(1)(ii), (c)(2) (1995), if NTN disagreed with the agency's use of prices in determining whether to use or disregard sales to affiliated customers, NTN was obligated to raise the issue in its case brief to the *Final Results*. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 103. Commerce, therefore, asserts that the Court must reject NTN's untimely argument or, in the alternative, sustain Commerce's arm's-length test because it is sup-

ported by substantial evidence and in accordance with law. *See id.* at 104. Torrington generally agrees with Commerce's determination. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. at 37–39.

In response, NTN asserts, *inter alia*, that it would have been futile to raise the issue of looking at factors other than price when determining price comparability at the administrative level because Commerce refused to look at additional factors in prior administrative reviews. *See* NTN's Reply Br. at 35–36.

C. Analysis

It is a cardinal principle of administrative law that a court may not consider a party's arguments that were not made before the agency. *See United States v. L.A. Tucker Truck Line*, 344 U.S. 33, 36–37 (1952) ("We have recognized * * * that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."). However, a well-recognized exception to the exhaustion of administrative remedies rule is that exhaustion is not required where the efforts of the party would be futile. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 902 (D.D.C. 1972) ("[I]t is well settled that an action should not be dismissed for failure to exhaust administrative remedies when an attempt to gain the desired relief from the agency in question would obviously be a futile act."). Also, 28 U.S.C. § 2637(d) grants the Court discretion in deciding when requiring exhaustion is appropriate. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986).

Here, the Court declines to address NTN's arm's-length test issue. Even if it might have been futile for NTN to raise the issue at the administrative level since Commerce refused in the fifth administrative review to consider looking at factors other than price, *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,511 (Dec. 17, 1996) (stating that "regulations direct us to focus on price"), the Court has repeatedly rejected the argument that Commerce should consider additional factors, that is, factors other than price, when determining whether sales prices to affiliated and unaffiliated parties were comparable. The Court also finds no basis under the circumstances of this case to depart from its prior holdings in *NSK Ltd. v. United States*, 21 CIT ____, ____, 969 F. Supp. 34, 55 (1997) (rejecting "the contention that Commerce should consider other factors (*i.e.*, factors other than price) in determining comparability"), and *NTN Bearing Corp. of Amer. v. United States*, 905 F. Supp. 1083, 1099 (1995) (disagreeing "with NTN that Commerce's arm[']s-length test is flawed because Commerce did not take into account certain factors proposed by

NTN"). Accordingly, Commerce's application of its arm's-length test is affirmed.

XIII. *Commerce's Treatment of Koyo's Home Market Billing Adjustments and NTN's Home Market Discounts as Direct Price Adjustments to Normal Value*

A. Background

In the *Final Results*, Commerce accepted claims discounts, rebates and post-sale price adjustments ("PSPAs") as direct adjustments to price used for calculating NV if it found that the respondent, in reporting these adjustments, "acted to the best of its ability and that its reporting methodology was not unreasonably distortive." 62 Fed. Reg. at 54,049. Commerce explained that, although it prefers that respondents report the price adjustments on a transaction-specific basis, it recognizes that this is not always feasible, especially given the extremely large number of transactions involved in AFB reviews. *See id.* at 54,049. Citing 19 U.S.C. § 1677e, Commerce stated that "it is inappropriate to reject allocations that are not unreasonably distortive in favor of facts otherwise available where a fully cooperating respondent is unable to report the information in a more specific manner." *Id.* Commerce, therefore, accepted price adjustments "when it was not feasible for a respondent to report the adjustment on a more specific basis, provided that the allocation method the respondent used [did] not cause unreasonable inaccuracies or distortions." *Id.*

Further, in applying this standard, Commerce stated that it did not "reject[] a respondent's allocation method solely because the allocation includes adjustments granted on [out-of-scope] merchandise." *Id.* Commerce, however, noted that "such allocations are not acceptable where [it had] reason to believe that respondents did not grant such adjustments in proportionate amounts with respect to sales of out-of-scope and in-scope merchandise." *Id.* To determine whether the allocations were granted in proportionate amounts, Commerce "examin[ed] the extent to which the out-of-scope merchandise included in the allocation pool [was] different from the in-scope merchandise in terms of value, physical characteristics, and the manner in which it is sold," noting that "[s]ignificant differences in such areas may increase the likelihood that respondents did not grant price adjustments in proportionate amounts with respect to sales of in-scope and out-of-scope merchandise." *Id.* Commerce explained that "[w]hile [it] scrutinize[d] any such differences carefully between in-scope and out-of-scope sales in terms of their potential for distorting reported per-unit adjustments on the sales involved in [its] analysis," it recognized that "it would not be reasonable to require that respondents submit sale-specific adjustment data on out-of-scope merchandise in order to prove that there is no possibility for distortion." *Id.* Commerce concluded that "[s]uch a requirement would defeat the purpose of permitting the use of reasonable allocations by a respondent that has cooperated to the best of its ability." *Id.*

In this case, Commerce treated certain home market discounts reported by NTN and certain home market PSPAs reported by Koyo as direct adjustments to NV, as opposed to direct or indirect selling expenses. *See id.* at 54,049–51. With respect to NTN, it reported its discounts separate for each customer and for each class or kind of merchandise. *See* NTN's Resp. Br. Attach. 2 (NTN's Secs. B-D Questionnaire Resp. (Sept. 9, 1996), at B–20). Commerce verified NTN's reported home market discounts and found that NTN granted the discounts on a product- and customer-specific basis, that is, the total discount granted was calculated "'by product for each customer.'" *Final Results*, 62 Fed. Reg. at 54,050. Based on NTN's submitted response, as well as documents reviewed at verification, Commerce concluded that NTN's home market prices should be adjusted to reflect NTN's home market discounts. *See id.*

Commerce also reviewed Koyo's reported home market PSPAs. *See id.* at 54,050–51. Koyo reported that it granted PSPAs, which it referred to as "billing adjustments," in four situations: (1) when it had to adjust a preliminary price because it began selling a product to a customer before negotiating a final price agreement with the customer; (2) when it renegotiated existing price agreements; (3) when it negotiated lump-sum adjustments with certain customers without reference to model-specific selling prices; and (4) other adjustments negotiated on a case-by-case basis. *See* Koyo's Response to Commerce's Questionnaire, Sec. B, at Field 16.1 (Sept. 10, 1996) (Case No. A–588–804, Fiche 66, Frame 1, Pub. Doc. 110, at 15–17). Koyo placed these billing adjustments in one of two categories. *See id.* at 16–17.

First, Koyo designated as "billing adjustment one" (BILADJ1H) those adjustments that were allocated over only in-scope merchandise and were "granted on a model-specific basis, [but were] calculated and reported * * * on a customer-specific basis (*i.e.*, on the basis of all AFB sales to that customer) because of the tremendous volume of reported sales." *See* Koyo's Response to Commerce's Supplemental Questionnaire, Sec. A-D (Jan. 13, 1997) (Case No. A–588–804, Fiche 92, Frame 19, Pub. Doc. 157, at 11). Koyo designated as "billing adjustment two" (BILADJ2H) those adjustments which were allocated over in-scope and out-of-scope merchandise and were either granted on: (1) a lump-sum basis which it negotiated with its customers without reference to model-specific selling prices, or (2) a model-specific basis, but which Koyo reported on a customer-specific basis because no computerized model-specific information was maintained. *See* Koyo's Response to Commerce's Questionnaire at 17. Billing adjustment two was reported by determining, on a customer-specific basis, the proportion of such adjustments attributable to in-scope merchandise. *See id.* In other words, the only difference between billing adjustment one and billing adjustment two, both of which involved customer-specific allocations, was that billing adjustment one was free from out-of-scope merchandise, while billing adjustment two relied on an allocation to remove the effect of any out-of-scope merchandise.

In accepting Koyo's reporting methodology for billing adjustment one, Commerce determined that "while Koyo has paper records of the adjustment, it is not feasible for Koyo to retrieve the information electronically or to allocate this adjustment more specifically, given the large volume of transactions involved, the level of detail contained in Koyo's normal accounting records, and the time constraints imposed by the statutory deadlines under which all parties must operate." *Final Results*, 62 Fed. Reg. at 54,051. Similarly, Commerce accepted Koyo's reporting methodology for billing adjustment two after concluding that: (1) "Koyo acted to the best of its ability in reporting this information using customer-specific allocations"; (2) "it was not feasible for Koyo to report this adjustment on a more specific basis" given that "Koyo's records do not readily identify a discrete group of sales to which each billing adjustment pertains and the extremely large number of POR sales Koyo made"; and (3) "Koyo's allocation methodology * * * was not distortive." *Id.*

B. Contentions of the Parties

Torrington contends that Commerce's acceptance of Koyo's reported home market billing adjustments as direct price adjustments was unlawful and not supported by substantial evidence because such adjustments must be reported on a sales-specific basis. *See* Torrington's Mem. Supp. Mot. J. Agency R. at 2. In particular, Torrington argues that Koyo's reported methodology of allocating adjustments on a customer-specific basis contravene's the CAFC's rationale in *Torrington Co. v. United States* ("*Torrington CAFC*"), 82 F.3d 1039 (Fed. Cir. 1996), because Koyo failed to show that all of its reported home market billing adjustments were directly related to relevant sales. *See id.* at 2. Torrington notes that *Torrington CAFC* followed prior CAFC cases to define "direct adjustments to price [as] * * * expenses which vary with the quantity sold * * * or that are related to a particular sale." *Id.* at 10 (internal quotations and citations omitted). Torrington also notes that Commerce had properly followed the CAFC's approach in the fifth administrative review, whereby the agency stated that the proper approach is to accept claims for price adjustments "'as direct adjustments to price if actual amounts are reported for each transaction [and] * * * [accept] price adjustments based on allocations [only if] * * * they are based on a fixed and constant percentage of sales price.'" *Id.* at 11 (quoting *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews* ("fifth administrative review"), 61 Fed. Reg. 66,472, 66,498 (Dec. 17, 1996)).

Torrington claims that in this review as well as the sixth review, however, Commerce "abandoned" the approach taken by the CAFC. *See id.* at 12. As a result, Commerce unlawfully redefined what the CAFC considered "direct" by adopting a new methodology. *See id.* According to

Torrington, Commerce's new methodology allowed Koyo to report allocated PSPAs if Koyo acted to the best of its ability in view of its record keeping system and the results were not unreasonably distortive. *See id.* Relying on *Lechmere, Inc. v. Nat'l Labor Relations Bd.*, 502 U.S. 527 (1992), Torrington maintains that Commerce's new methodology is unlawful since it ignores the well-settled definition of "direct" adjustments to price enunciated by the CAFC. *See id.* at 12–13. Torrington further asserts that although the fifth administrative review and *Torrington CAFC* pre-date the URAA amendments, "[t]he new statute retains the distinction between 'direct' and 'indirect' expenses and Congress gave no indication that changes in meanings were ever intended." *Id.* at 13–14 (citation omitted). Torrington, therefore, argues that since Commerce's new methodology must conform with precedent, this Court should review Koyo's home market PSPAs by applying the rationale of *Torrington CAFC*. *See* Torrington's Mem. Supp. Mot. J. Agency R. at 15.

Torrington recognizes that this Court approved the new methodology used by Commerce in *Timken Co. v. United States* ("*Timken*"), 22 CIT ____, 16 F. Supp. 2d 1102 (1998), on the grounds that "the new [methodology] allowed a more flexible response, reflecting the 'more lenient statutory instructions of [19 U.S.C. § 1677m(e)].'" *Id.* at 16 (quoting *Timken*, 16 F. Supp. 2d at 1108). Nevertheless, Torrington maintains, *inter alia*, that the Court should reconsider its position in *Timken* because § 1677m(e), while reflecting Congress's intent for Commerce to be more flexible regarding certain essential information submitted by respondents, "does not affect Commerce's fundamental policy, consistently approved by the courts, of putting the burden of proof with the party who intends to benefit from the claim made." *Id.* As such, Torrington maintains that even if Commerce's new, but erroneous methodology was applied to the instant case, Koyo did not carry its burden of proof in establishing entitlement to any advantageous adjustment. *See id.* at 18. Specifically, Torrington claims that Koyo failed to demonstrate that its reported home market billing adjustment allocations were not distortive and that it acted to the best of its ability (that is, made its best efforts) in reporting the claimed adjustment amounts. *See id.* at 18–19. Torrington notes, for instance, Commerce in the *Final Results* "failed to directly address whether Koyo 'acted to the best of its ability'" in reporting billing adjustment one. *Id.* at 19.

Torrington additionally asserts that Koyo did not provide substantial evidence to prove that it used its best efforts to make adjustments on as specific a basis as possible. *See id.* at 20. Rather, Torrington notes that Commerce merely excused more precise reporting by Koyo on the grounds that it was not feasible for Koyo to allocate the adjustment on a more specific basis because of the large number of sales at issue, the level of detail involved in Koyo's accounting records, and the time constraints imposed by statutory deadlines. *See id.* at 20–21 (citing *Final Results*, 62 Fed. Reg. at 54,051). Torrington also contends that Koyo's argument of infeasibility in undertaking more specific reporting is invalid because

Koyo could have modified its accounting system in order to arrive at more precise data. *See id.* at 21. Moreover, Torrington asserts that aside from what was or was not possible, Koyo did not provide evidence on record to demonstrate that it was infeasible or inconvenient to provide more specific reporting and, therefore, there is "nothing objective for [the] Court to review other than Commerce's conclusory declarations." *Id.* Torrington claims that, in fact, (1) with respect to billing adjustment one, the record evidence confirms that Koyo could have reported amounts more precisely, and (2) with respect to billing adjustment two, the record evidence suggests that Koyo could have reported amounts more precisely for at least some of the adjustments. *See id.* (citing *Final Results*, 62 Fed. Reg. at 54,051).

Torrington further argues that Commerce's determination to accept certain home market discounts reported by NTN was not in accordance with law and not supported by substantial evidence. *See id.* at 3, 22–25. Specifically, Torrington claims that, as it did in the *Final Results*, *see* 62 Fed. Reg. at 54,050, based on two documents Commerce obtained at verification which related to the negotiation of certain discounts, NTN's reported discounts were not granted on a product- and customer-specific basis and suggests that they were likely applied to non-subject merchandise, *see* Torrington's Mem. Supp. Mot. J. Agency R. at 22–23. In addition, Torrington asserts that the record evidence demonstrates that discounts at issue were not discounts at all but, rather, were claims for rebates for which, Torrington contends, did not meet Commerce's standard for such an adjustment. *See id.* at 24–25. As such, Torrington claims that "the record and Commerce's description of the discounts were at odds, and Commerce has not articulated a rational connection between the facts found and the choice made." Torrington's Reply Br. at 7 (citation and internal quotation marks omitted).

Torrington, therefore, requests that this Court reverse Commerce's determination with respect to each subject adjustment and remand the case to Commerce with instructions to: (1) disallow Koyo's downward home market billing adjustments, but allow all upward home market billing adjustments in calculating NV; and (2) deny NTN's claimed adjustment for home market discounts in calculating NV. *See* Reply Br. at 9–10.

Commerce responds that Torrington erred in relying on *Torrington CAFC* because the case does not stand for the proposition that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. *See* Def.'s Mem. in Partial Opp'n to Mot. J. Agency R. at 108. Rather, the *Torrington CAFC* court "merely overturned a prior Commerce practice * * * of treating certain allocated price adjustments as indirect selling expenses," *id.* at 109 (citing *Torrington CAFC*, 82 F.3d at 1047–51), and "did not address the propriety of the allocations methods that respondents used in reporting the price adjustments in question," *see id.* at 109–10 (quoting *Final Results*, 62 Fed. Reg. at 54,050). Also, contrary to Torrington's assertion regarding Com-

merce's position during the fifth administrative review, Commerce did not consider *Torrington CAFC* as addressing proper allocation methodologies; rather, Commerce, only viewed *Torrington CAFC* as holding that "Commerce could not treat indirect selling expenses as improperly allocated price adjustments." *See id.* at 111. Indeed, Commerce notes that this Court interpreted *Torrington CAFC* in *NSK Ltd. v. United States*, 969 F. Supp. 34, 43 (1997), in a manner consistent with Commerce's reading of the case in this review. *See id.* at 112. Commerce also notes that pursuant to its new methodology, it does not consider price adjustments to be any type of selling expense, either direct or indirect, and, therefore, Torrington's argument is not only without support, but also inapposite to *Torrington CAFC*. *See id.* Moreover, Commerce asserts that this Court in *Timken* approved of Commerce's modified methodology of accepting respondents claims for discounts, rebates and other billing adjustments as direct price adjustments, where this Court found the methodology to be consistent with requisites of 19 U.S.C. § 1677m(e). *See id.* at 112–13 (citing *Timken*, 16 F. Supp. 2d at 1108).

Commerce also argues that its treatment of Koyo's reported home market billing adjustments and NTN's reported home market discounts as direct adjustments was supported by substantial record evidence and otherwise in accordance with law because it is consistent with *Timken*, that is, Commerce: (1) "used its acquired knowledge of the respondents' computer system and databases to conclude that they could not provide the information in the preferred form," and (2) "scrutinized the respondent's data before concluding that the data were reliable," and (3) found "that the adjustments on scope and non-scope merchandise did not result in unreasonable distortions." *Id.* at 114.

In particular, with respect to Koyo's reported home market billing adjustment one, Commerce asserts that (1) given Koyo's record-keeping practices, (2) "in light of the fact Koyo limited its allocation to specific customers," and (3) that Koyo "avoided allocating adjustments granted on out-of-scope merchandise," Commerce's properly accepted the adjustment. *Id.* at 115–16. Commerce also argues it properly accepted billing adjustment two. *See id.* at 117. With regard to the first type of billing adjustment two, the lump-sum payment to customers, Commerce maintains that since these payments were not earned on particular sales, the best allocation for these payments was over all merchandise sold to the particular customer in question. *See id.* Commerce claims that "[t]he fact some of this merchandise was non-scope merchandise [had] no effect on the final amount apportioned to in-scope merchandise." *Id.* With respect to the small portion of billing adjustment two consisting of model-specific adjustment for which Koyo had no computerized records, Commerce contends: (1) "in past reviews [it] has determined at verification that Koyo's records do not permit more accurate reporting"; and (2) "Koyo's in-scope merchandise was sufficiently similar to its other merchandise that there was little chance of distortion due to allocations across subject merchandise." *Id.* at 117.

Commerce also notes that in the sixth administrative review of AFBs, it verified the manner in which Koyo kept its normal records and confirmed Koyo's reporting for its billing adjustments was reasonable in light of its records. *See id.* at 119 (citing 62 Fed. Reg. at 2096). Commerce asserts that this is not an admission that Koyo could not accurately reports its prices generally, rather it merely was a finding that Koyo normally aggregated by customer certain price adjustments. *See id.* Further, Commerce claims that "the fact that Koyo could produce the supporting documentation which lay behind its aggregated record-keeping does not establish that it was unreasonable for Commerce to accept the allocated methodology used by Koyo in its records as maintained in the normal course of business." *Id.* Rather, Commerce maintains that, in reviewing reported allocations, it looks not only to what is theoretically possible, but what is consistent with § 1677m(e) and it also considers what is reasonable in light of the number of transactions involved and the possibility of unreasonable distortions. *See id.* Commerce argues that since Koyo's allocation for this POR was made on a customer-specific basis and did not raise a serious danger of distortion, it acted reasonably in accepting Koyo's billing adjustments. *See id.* at 119–20.

With respect to NTN's reported home market discounts, Commerce asserts that, contrary to Torrington's contention, it verified that these discounts were granted on a customer-specific and product-specific basis, that is, across all sales to a customer of a particular class or kind of merchandise. *See id.* at 120. Thus, Commerce contends that "NTN properly attributed these discounts to the sales on which they were earned." *Id.* Commerce also claims, *inter alia*, that Torrington incorrectly characterizes NTN's billing adjustment at issue as a rebate. *See id.* at 123–25. Commerce notes that under its prior standard for determining whether to grant "an adjustment for a rebate, Commerce required evidence that the rebate 'program' was known to both parties at the time of the sale." *Id.* at 125 (citation omitted). Commerce, however, notes that NTN's reported home market discounts "do not constitute a rebate as that term was previously used by Commerce" because "[t]hey are class-or-kind specific price reductions negotiated with a specific customer" and, therefore, Torrington's contention based on Commerce's prior rebate standard should be disregarded. *Id.* Accordingly, Commerce asserts that since Commerce's treatment of NTN's home market discounts is supported by substantial evidence and is otherwise in accordance with law, it should be sustained. *See id.*

Koyo supports Commerce's position, asserting that its acceptance of home market billing adjustments one and two was in accordance with law and supported by substantial evidence. *See* Koyo's Mem. Supp. Mot. J. Agency R. at 2–3, 8–20. First, Koyo notes that pre-URAA judicial precedent does not prohibit Commerce's treatment of Koyo's billing adjustments as direct price adjustments, that is, the Court recognized in *Timken* that Commerce may reevaluate its treatment of PSPAs. *See id.*

at 8–9 (citing *Timken*, 16 F. Supp. 2d at 1107). Thus, Koyo contends that "Torrington's argument that pre-URAA judicial precedent prohibits [Commerce] treatment of PSPAs as price adjustments rather than expenses in the underlying review is no longer relevant." *Id.* at 9.

Koyo also maintains that Commerce's change to a more liberalized reporting methodology is consistent with the URAA and Commerce's new antidumping regulations. *See id.* at 10–14. Koyo asserts that, as the Court recognized in *Timken*, Commerce's decision to allow Koyo to treat its PSPAs as adjustments to price and allocate them is permissible under 19 U.S.C. § 1677m(e)'s more liberalized reporting instructions, which direct Commerce not to reject data submissions once Commerce concludes that certain criteria are satisfied. *See id.* at 10–12. Koyo further asserts that Commerce's treatment of allocated billing adjustments is also consistent with the new antidumping regulation, 19 C.F.R. § 351.401(g)(1) (effective July 1, 1997), which permits Commerce to "'consider allocated expenses and price adjustments when transaction-specific reporting is not feasible.'" *Id.* at 13 (quoting 19 C.F.R. § 351.401(g)(1)). Koyo recognizes that although the regulations are not binding for this POR, it is nonetheless informative as to Commerce's practice concerning the acceptance of allocated price adjustments under the URAA, which govern this review. *See id.* at 13, n. 5.

Moreover, contrary to Torrington's assertion that even under Commerce's new reporting methodology Koyo's PSPAs should be denied, Koyo argues that it acted to the best of its ability in reporting billing adjustments one and two and that the reporting methodologies it employed were non-distortive. *See id.* at 15. With respect to billing adjustment one, Koyo asserts that given that the adjustment was allocated over only scope merchandise, and that the pool of scope merchandise was similar in terms of value, physical characteristics, and the manner in which it is sold, there is no reason to believe the adjustment resulted in unreasonable distortions. *See id.* at 16. Koyo also asserts that since this adjustment was allocated "over only scope merchandise, it would satisfy even the rigorous standard for allocation of an expense that this Court articulated under pre-URAA antidumping law." *Id.* Koyo further maintains that although Commerce did not use the specific language of "acted to the best of its ability" in the *Final Results* for billing adjustment one, Commerce found that it was not "feasible" for Koyo to either retrieve or allocate this adjustment more specifically and, thus, Commerce basically found that Koyo acted to the best of its ability. *See id.* at 17–18. With regard to billing adjustment two, Koyo claims that although the adjustment was allocated over scope and non-scope merchandise, the adjustment was proper because (1) it reported the adjustment in this manner because its records did not allow it to report it on a more specific basis, and (2) the allocation methodology for this adjustment did not have a distortive effect. *See id.* at 18–20.

Koyo further argues that in accepting billing adjustments one and two, Commerce did not, as Torrington maintains, shift the burden to the

respondent seeking the price adjustment. *See id.* at 15. Rather, Koyo placed information on record, and based on that data, Commerce accepted Koyo's reported PSPAs, that is, Koyo met its burden of demonstrating eligibility for the adjustment according to the new reporting criteria approved under *Timken*. *See id.*

NTN asserts that Commerce correctly accepted its reported home market discounts as direct price adjustments to NV. *See* NTN's Resp. Br. at 4. First, NTN noted that, contrary to Torrington's allegation that two documents reviewed at verification contradict Commerce's determination that NTN's reported adjustments were discounts, Commerce based its finding of no discrepancies in NTN's reported discounts after careful review and verification of numerous documents, not just the two documents. *See id.* at 6. NTN further notes that the record unequivocally establishes that its claimed adjustments were: (1) discounts, rather than rebates, as Torrington alleges; (2) reported and granted on a customer– and product-specific basis; and (3) applied to the subject merchandise. *See id.* at 6–8. In sum, NTN contends that Torrington's allegations amount to nothing more than mere speculations and, therefore, Commerce's allowance of NTN's reported home market discounts should be affirmed. *See id.*

NSK asserts that although Torrington claimed in its USCIT R. 56.2 motion that Commerce erred by allowing allocated discounts and PSPAs in home market price calculations, Torrington limited its argument to Koyo's reported home market billing adjustments and NTN's reported home market discounts. *See* NSK's Opp'n to Torrington's Mot. J. Agency R. at 2. NSK, therefore, argues that Torrington abandoned any challenge to Commerce's decision to accept NSK's home market discounts or PSPAs and, thereby, the Court should sustain Commerce's decision to apply such adjustments to NV. *See id.*

C. Analysis

The Court disagrees with Torrington that *Torrington CAFC* dictates that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. Rather, as Commerce correctly noted, the Court notes that *Torrington CAFC* "merely overturned a prior Commerce practice * * * of treating certain allocated price adjustments as indirect selling expenses," 82 F.3d at 1047–51, and "did not address the propriety of the allocation methods that respondents used in reporting the price adjustments in question," *Final Results*, 62 Fed. Reg. at 54,050. The Court further notes that *Torrington CAFC* was decided under pre-URAA law, that is, it did not take into consideration the new statutory guidelines of 19 U.S.C. § 1677m(e). Moreover, the Court acknowledged in *Timken* that although (1) "Commerce treated rebates and billing adjustments as selling expenses in preceding reviews under pre-URAA law, and (2) "previously decided that such adjustments are selling expenses and, therefore, should not be treated in as adjustments to price," the Court nevertheless determined that this did not "preclude Commerce's change in policy or this Court's reconsideration of it stance

in light of the newly-amended antidumping statute [(that is, 19 U.S.C. § 1677m(e))]." 16 F. Supp. 2d at 1107.

Indeed, the Court approved in *Timken* Commerce's modified methodology of accepting claims for discounts, rebates and other billing adjustments as direct price adjustments to NV, *see id.* at 1107–08, and reaffirmed its decision in *Torrington Co. v. United States* ("*Torrington CIT*"), 24 CIT ____, Slip Op. 00–44 (Apr. 19, 2000). Specifically, in *Timken*, the Court reasoned that "[n]either the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs." 16 F. Supp. 2d at 1108 (citing *Torrington CAFC*, 82 F.3d at 1048). The Court, however, noted that 19 U.S.C. § 1677m(e) "specifically directs that Commerce shall not decline to consider an interested party's submitted information if that information is necessary to the determination but does not meet all of Commerce's established requirements, if the [statute's] criteria are met." *Id.* The Court, therefore, approved of Commerce's change in methodology, "as it substitutes a rigid rule with a more reasonable method that ensures that a respondent's information is reliable and verifiable. This is especially true in light of the more lenient statutory instructions of subsection 1677m(e)." *Id.*

Accordingly, the Court in *Timken* upheld Commerce's decision to accept Koyo's billing adjustments and rebates, "even though they were not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise." *See id.* at 1106. Similarly, in *Torrington CIT*, the Court followed the rationale of *Timken* and upheld Commerce's determination to accept respondents' rebates even though they were reported on a customer-specific rather than transaction-specific basis and even though the allocation methodology used included rebates on non-scope merchandise. *See* 24 CIT at ____, Slip Op. 00–44, at 13–16.

The Court finds that Commerce's decision to accept Koyo's reported home market billing adjustments and NTN's reported home market discounts was supported by substantial evidence and was fully in accordance with the post-URAA statutory language and the SAA's statements. First, the record clearly indicates that Commerce properly used its acquired knowledge of the Koyo's computer system and databases to conclude that they could not provide the information in the preferred form and, moreover, properly scrutinized Koyo's reported billing adjustments before concluding that the adjustments were reliable. Commerce also properly accepted Koyo's allocation methodology, even though it included adjustments on in-scope and out-of-scope merchandise, as it carefully reviewed the differences between such merchandise and ensured that the allocations were not unreasonably distortive. Also, the record clearly supports that NTN properly attributed its discounts to the sales on which they were earned and such adjustments were in fact discounts rather than rebates.

Moreover, the record and the *Final Results* demonstrate that the requirements of 19 U.S.C. § 1677m(e), as noted earlier, were satisfied by the respondents. First, Koyo's and NTN's reported adjustments were submitted in a timely fashion. *See* § 1677m(e)(1). Second, the information Koyo and NTN submitted was verified by Commerce. *See* § 1677m(e)(2). Third, the respondents' information was not so incomplete that it could not serve as a basis for reaching a determination. *See* § 1677m(e)(3). Fourth, Koyo and NTN demonstrated that they acted to the best of their abilities in providing the information and meeting Commerce's new reporting requirements. *See* § 1677m(e)(4). Although Commerce did not use the specific language of "acted to the best of its ability" in the *Final Results* with respect to billing adjustment one, the Court finds that Commerce's comment that it was not "feasible" to either retrieve or allocate the adjustment more specifically clearly raises the inference that Koyo acted to the best of its ability. Finally, the Court finds that there was no indication that the information was incapable of being used without undue difficulties. *See* § 1677m(e)(5).

Commerce's determinations with respect to Koyo was also consistent with the SAA. The Court agrees with Commerce's finding in the *Final Results* that given the extremely large volume of transactions, the level of detail contained in Koyo's normal accounting records, and time constraints imposed by the statute, Koyo's reporting and allocation methodology were reasonable. This is consistent with the SAA directive under § 1677m(e), which provides that Commerce "may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities." SAA at 865. Thus, the Court finds that Commerce properly considered the ability of Koyo to report its billing adjustments on a more specific basis.

Accordingly, the Court concludes that Commerce's acceptance of Koyo's reported billing adjustments and NTN's home market discounts as direct adjustments to NV is supported by substantial evidence and fully in accordance with law. The Court also finds that since Torrington failed to raise a challenge to Commerce's decision to accept NSK's home market discounts or PSPAs, the Court sustains Commerce's decision to accept such adjustments.

XIV. *Other Issues*

The Court has considered plaintiffs' and defendant-intervenors' other challenges to the *Final Results*, but finds them unpersuasive. Further, where parties have indicated in their briefs that their arguments for the instant matter are outlined in briefs submitted for related litigation pending before the Court, the Court declines to address such challenges. If a party wants consideration of its arguments, it should clearly articulate them in briefs submitted for the case at bar.

CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to: (1) annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for this review; (2) make adjustments pur-

suant to 19 U.S.C. § 1677a(c) to § 1677a(a)'s starting price for determining EP; (3) make adjustments pursuant to § 1677a(c) and (d) to § 1677a(b)'s starting price for determining CEP; (4) articulate how the record supports its decision to recalculate NTN's home market indirect selling expenses without regard to LOT; (5) clarify how it complied with 19 U.S.C. §§ 1677e, 1677m by using facts available and applying an adverse inference with respect to NTN's alleged zero-price sample sales and, if Commerce determines that it conformed with the statutory framework, to include NTN sample sales in its United States sales database or, if Commerce determines it did not adhere to all of the statutory prerequisite conditions, to give NTN the opportunity to remedy or explain any deficiency regarding its sample sales; and (6) clarify whether NTN was provided with notice and opportunity to respond pursuant to § 1677m(d) with regard to its COP and CV data. Commerce's final determination is affirmed in all other respects.

(Slip Op. 00–65)

PESQUERA MARES AUSTRALES LTDA., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND COALITION FOR FAIR ATLANTIC SALMON TRADE, DEFENDANT-INTERVENOR

Court No. 98–08–02680

[Contested portion of Defendant's Final Determination sustained.]

(Dated June 5, 2000)

Arnold & Porter, (Michael T. Shor and *Kevin T. Traskos)* for plaintiff Pesquera Mares Australes.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Ann Talbot* and *Stacy J. Ettinger),* of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (Michael J. Coursey, and *David C. Smith, Jr.)* for defendant-intervenor Coalition for Fair Atlantic Salmon Trade.

OPINION

GOLDBERG, *Judge:* In this action, the Court reviews a challenge to the Department of Commerce's ("Commerce") *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile*, 63 Fed. Reg. 31,411 (June 9, 1998) ("*Final Determination*"). Plaintiff Pesquera Mares Australes Ltda. ("Pesquera") argues that Commerce's *Final Determination* is neither in accordance with law nor supported by substantial evidence because Commerce failed to distinguish between super-premium and premium grade fresh Atlantic salmon ("salmon").

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c)(1994). The Court sustains Commerce's determination to treat super-premium and premium grade salmon as identical merchandise.

I.

BACKGROUND

On July 2, 1997, Commerce initiated an antidumping duty investigation to determine whether imports of salmon were being or were likely to be sold in the United States at less-than-fair-value. *See Initiation of Antidumping Duty Investigation: Fresh Atlantic Salmon From Chile*, 62 Fed. Reg. 37,027 (July 10, 1997). After determining that it would be impracticable to examine all Chilean producers and exporters of salmon, Commerce decided to limit its investigation to the five largest Chilean exporters. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon From Chile*, 63 Fed. Reg. 2,664, 2,664–66 (Jan. 16, 1998)("*Preliminary Determination*"). Commerce published its *Final Determination* on June 9, 1998. *See* 63 Fed. Reg. at 31,411.

II.

STANDARD OF REVIEW

Commerce's *Final Determination* will be sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(1994).

To determine whether Commerce's interpretation of a statute is in accordance with law, the Court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first directs the Court to determine "whether Congress has directly spoken to the precise question at issue." *See id.* at 842. To do so, the Court must look to the statute's text to ascertain "Congress's purpose and intent." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (1998) (citing *Chevron*, 467 U.S. at 842–43 & n.9). If the plain language of the statute is not dispositive, the Court must then consider the statute's structure, canons of statutory interpretation, and legislative history. *See id.* at 882 (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470–80 (1997)); *Chevron* 467 U.S. at 859–63; *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)). If, after this analysis, Congress's intent is unambiguous, the Court must give it effect. *See id.*

If the statute is either silent or ambiguous on the question at issue, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Thus, the second prong of the *Chevron* test directs the Court to consider the reasonableness of Commerce's interpretation. *See id.*

With respect to Commerce's factual findings, the Court will sustain Commerce's determinations if they are supported by substantial evi-

dence. "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the Court must sustain Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 137, 744 F.2d 1556, 1563 (1984).

III.

DISCUSSION

The Court reviews Commerce's decision to treat super-premium and premium salmon as "identical in physical characteristics." The Court finds that Commerce's determination is in accordance with law and supported by substantial evidence.

A. *Commerce Acted in Accordance with Law in Treating Super-Premium and Premium Salmon Sold in Japan as "Identical in Physical Characteristics" with Premium Salmon Sold in the United States.*

Under U.S. antidumping law, Commerce determines dumping margins "by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." 19 U.S.C. § 1677f–1(d)(1)(A)(i)(1994). "Export price" and "constructed export price" are the prices at which the subject merchandise is sold in the United States. *See* 19 U.S.C. § 1677a(a),(b)(1994). In this case, normal value is "the price at which the *foreign like product* is sold * * * for consumption in a country other than the exporting country or the United States." 19 U.S.C. § 1677b(a)(1)(B)(ii)(1994)(emphasis added). To determine "foreign like product," Commerce follows the directive of the antidumping statute:

> The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

> (ii) like that merchandise in the purposes for which used, and
> (iii) which the administrating authority determines may reasonably be compared with that merchandise.

19 U.S.C. §1677(16) (1994).

In this case, pursuant to the statute, Commerce evaluated whether Chilean exporters were dumping salmon in the United States by comparing salmon prices in the United States to salmon prices in Japan. *See id.* For purposes of the *Preliminary Determination*, Commerce accepted Pesquera's suggestion that a physical distinction existed between super-premium and premium grade salmon sold in Japan. *See* 63 Fed. Reg. at 2,666 n.3. If such a distinction existed, Commerce presumably would not be able to treat the two grades of salmon as "identical in physical characteristics" to the premium grade salmon sold in the United States.

In the *Final Determination*, however, Commerce declined to recognize a distinction between super-premium and premium grade salmon sold in Japan. *See* 63 Fed. Reg. at 31,414. Commerce determined "that the differences between super-premium and premium salmon are so minor as to not warrant separate classification in an antidumping analysis." *Id.* at 31,414. Thus, Commerce treated the super-premium and premium salmon sold in Japan as "identical in physical characteristics" with the premium salmon sold in the United States. *See Final Determination*, 63 Fed. Reg. at 31,415.

Pesquera maintains that the two grades of salmon are physically distinct, *see* Initial Br. of Pl. Pesquera Mares Australes, Ltda. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pesquera's Br."), at 32–35, 41–42, and therefore that, under the statute, Commerce is prohibited from treating super-premium grade salmon as identical in physical characteristics with premium salmon. *See id.* at 24–37. According to Pesquera, the premium salmon sold in Japan alone falls under Section 1677(16)(A) of the statute, while the super-premium salmon sold in Japan falls under Section 1677(16)(B) or Section 1677(C). *See id.*

Pesquera reasons that Commerce cannot treat merchandise as "identical in physical characteristic" unless the merchandise is exactly alike. *See id.* at 29. Further, Pesquera argues that if merchandise has commercially distinct characteristics that cause material price differences, the merchandise cannot have "identical physical characteristics." *See id.* at 32. Pesquera claims that the statutory structure compels such a conclusion because it provides for an alternative designation of similar, but not identical, merchandise. *See id.*

The Court does not agree. Under a *Chevron* analysis, "identical in physical characteristics," as used in the statute, is an ambiguous term. *See* 467 U.S. at 842–43. Pesquera is correct that the literal meaning of "identical" is "the very same" or "exactly alike or equal." *See Webster's New World Dictionary* 696 (2d College ed. 1984). Yet, such an interpretation of the term would frustrate the purpose of the statute. The statute states that Commerce should consider "[t]he subject merchandise and

other merchandise which is identical in physical characteristics." 19 U.S.C. § 1677(16)(A)(emphasis added). Since "subject merchandise" is defined by the statute to mean "the class or kind of merchandise that is within the scope of an investigation," 19 U.S.C. § 1677(25), Congress's inclusion of "other merchandise" in Section 1677(16)(A) suggests that Congress intended to include merchandise that was not "exactly the same." Further, the statute does not direct Commerce how to decide whether merchandise is identical in physical characteristics. Additionally, the Court of International Trade has implicitly indicated that the phrase "identical in physical characteristics" does not mean exactly alike. *See Rautauruukki Oy v. United States*, 1998 WL 465219 at *5.

The Court of Appeals for the Federal Circuit and Commerce have previously recognized the ambiguity in this statutory provision. *See Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995) (finding that Congress delegated authority to Commerce because of a "gap" in the statute); *Roller Chain, Other Than Bicycle From Japan: Final Results and Partial Recission of Antidumping Duty Administrative Review*, 63 Fed. Reg. 63,671–78 (November 16, 1998) (antidumping statute does not detail the methodology to be used by Commerce). Accordingly, because the statute is ambiguous, the Court will affirm Commerce's interpretation of the statute as long as it is reasonable. *See Chevron*, 467 U.S. at 842–43.

In practice, Commerce conducts a case-by-case evaluation to determine whether merchandise is identical in physical characteristics. *See, e.g., RHP Bearings Ltd., NSK v. United States*, 83 F.Supp.2d 1322(1999); *AK Steel Corp. v. United States*, No. 970–152, 96–05–01312, 1997 WL 728284, *11–13 (CIT Nov. 14, 1997); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 Fed. Reg. 73,196, 73,200–01 (Dec. 29, 1999). Under this evaluation, Commerce utilizes various methods of analysis, taking into account the specific characteristics of the merchandise and the relevant market.[1] *See id.* Therefore, to determine the reasonableness of Commerce's statutory interpretation, the Court must look at the specific methods used here by Commerce.

The Court finds that in this case, Commerce's determination regarding the identical nature of super-premium and premium grade salmon is "a reasonable means of effectuating the statutory purpose" and is thus in accordance with law. *See Ceramica Regiomontana*, 636 F.Supp. at 966. Before issuing the *Preliminary Determination*, Commerce solicited and received comments from the parties regarding the physical characteristics of different salmon grades. *See* 63 Fed. Reg. at 2,664. Pesquera asserted that super-premium and premium salmon were two distinct

---

[1] Commerce's asserts that it analyzes only "commercially meaningful characteristics" to determine if merchandise is identical. *See* Def.'s Mem. in Opp'n to the Rule 56.2 Mot. for J. Upon the Agency R. Filed by Pesquera Mares Australes Ltda. ("Commerce's Br."), at 28–30. It is the Court's view that the phrase "commercially meaningful characteristics," as used by Commerce in its prior determinations and in its briefs in this case, has no independent substantive meaning. Rather, as noted, Commerce appears to conduct an ad hoc analysis each time it analyzes whether merchandise is identical.

grades. *See id.* at 2,666 n.3. In the *Preliminary Determination*, Commerce tentatively adopted Pesquera's assertion. *See id.* At verification, however, Commerce determined that the evidence on the record demonstrated that both super-premium and premium grade salmon sold in Japan were "identical" in grade to premium grade salmon sold in the United States. *See Final Determination*, 63 Fed. Reg. at 31,413–15. Therefore, Commerce treated this merchandise as identical. *See id.* In reaching such a conclusion, Commerce reasoned that nominal differences in the merchandise did not prevent the merchandise from being identical under the statute. *See id.* In this case, Commerce's procedures were a "reasonable means of effectuating the statutory purpose" because Commerce's intent and effect was to identify what, if any, merchandise was identical under the statute.

Because Commerce took comments from interested parties and investigated the evidentiary basis for the claims, Commerce's analysis was evenhanded and well informed. Moreover, because the statute is ambiguous and because the statutory language and structure indicate that Congress likely intended Commerce to consider merchandise that was not exactly the same as identical, the Court finds that Commerce's methodology was a reasonable interpretation of the statute. Because Commerce's actions were a reasonable interpretation of the statute, Commerce's decision was in accordance with law. *See Chevron*, 467 U.S. at 842–43.

B. *Commerce's Determination that Super-Premium and Premium Salmon Sold in Japan were Identical to Premium Salmon Sold in the United States is Supported by Substantial Evidence.*

Commerce determined, based on evidence in the record, that any differences between super-premium and premium salmon were "nominal." *See Final Determination*, 63 Fed. Reg. at 31,414. Because any physical differences between the grades were nominal, Commerce reasoned that the merchandise was identical for purposes of the statute. *See id.*

Pesquera claims that the evidence on the record does not support Commerce's decision. *See* Pesquera's Br., at 41–48. Specifically, Pesquera claims that (1) Commerce ignored physical differences between super-premium and premium grade salmon, (2) Commerce misinterpreted evidence concerning meat color, and (3) evidence concerning salmon production in other countries was improperly considered and irrelevant. *See id.* at 8–16, 41–48; Reply Br. of Pesquera Mares Australes, Ltda. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pesquera's Reply Br."), at 15–41. The Court considers each argument in turn and holds that, while other conclusions might be drawn from the record, Commerce's determination is supported by substantial evidence.

1. Commerce did Not Ignore Evidence on the Record.

Pesquera argues that Commerce ignored evidence of physical differences between super-premium and premium salmon. *See* Pesquera's Br., at 41–42. Commerce, however, acknowledged that physical differ-

ences existed between super-premium and premium grade salmon. *See Final Determination*, 63 Fed. Reg. at 31,414. Commerce explained that "[d]epartment verifiers observed that there were in fact minor differences between salmon classified as premium and salmon classified as super-premium, such as small scale loss or light lacerations. These minor differences, however, do not establish a different grade of salmon for purposes of our analysis." *Id.* Thus, Commerce did not ignore physical differences, but chose to consider these differences to be so minor as to be irrelevant to the analysis. Because "identical" does not necessarily mean "exactly alike," *see supra*, Section III.A., this reasoning is well within Commerce's discretion. *Cf. Steel from Germany*, 60 Fed. Reg. 65,264, 65,271 (December 19, 1995) (considering products as identical when merchandise dimensions were different).

2. Commerce's Finding That Meat Color is Not a Distinction Between Grade is Supported by Substantial Evidence.

In its pre-verification filing, Pesquera claimed that salmon meat color was the "single most important" distinction between super-premium grade and premium salmon. *See Final Determination*, 63 Fed. Reg. at 31,414. At verification, Commerce determined that in practice salmon classified as super-premium had the same meat color as salmon classified as premium. *See id.* Based on this evidence, Commerce concluded that super-premium and premium salmon should be considered to have identical physical characteristics for purposes of the statute. *See id.* at 31,415.

Pesquera claims that Commerce erroneously found that super-premium and premium grades had the same meat color. *See* Pesquera's Br., at 42 n.89; Pesquera's Reply Br., at 30, 31–40. Moreover, Pesquera asserts that it never claimed that meat color was the primary distinction between super-premium and premium grade salmon. *See* Pesquera's Br., at 42–43.

The Court finds that Commerce marshaled substantial evidence that in practice super-premium and premium grade salmon were not distinguished based on meat color.[2] *See Final Determination*, 63 Fed. Reg. at 31,415; Commerce's App., Ex. 20 (Internal Commerce Mem. (inspection of Eicomar processing plant), dated Apr. 7, 1998), 2–3. Specifically, Commerce marshaled evidence (1) that all salmon grades were fed the same amount and type of pigmented food pellets, (2) that these food pellets resulted in a uniform meat color regardless of grade, and (3) that meat color was only occasionally checked during processing. *See Final Determination*, 63 Fed. Reg. at 31,415.

Moreover, during the comment period, Pesquera did, in fact, claim that meat color was one of the factors distinguishing super-premium and premium grade salmon. *See* App. to Commerce's Br., Vol. II, at Ex.

[2] Commerce contends that it discovered at verification that all super-premium and premium grade salmon were fed the same amount and type of pigmented food pellets. *See Final Determination*, 63 Fed. Reg. at 31414. Pesquera claims that Commerce had that information before verification. *See* Pesquera's Reply Br., at 32–33. The timing is irrelevant. Commerce did not claim that discovering the pigment pellet evidence at the verification, rather than earlier, changed or otherwise affected its position.

10 (Letter from Michael T. Shor to William M. Daley on Nov. 3, 1997, at 14) ("Of all the grading differences, the difference in color is perhaps the most important and most significant.").[3] And Pesquera submitted documentary evidence of a purported color distinction between the grades to Commerce.[4] *See, e.g.*, App. to Commerce's Br., Vol. II, at Ex. 9 (Letter from Michael T. Shor to William M. Daley on Oct. 10, 1997, Attach. 1 (Asociacíon Standards)). Based on this evidence, Commerce concluded that the physical characteristic—meat color—Pesquera claimed distinguished super-premium from premium grade salmon was in practice not a distinction. *See Final Determination*, 63 Fed. Reg. 31,414. This evidence supports Commerce's conclusion that the distinction between super-premium and premium grade salmon is either non-existent or nominal.

3. Commerce's Determination is Properly Supported by Substantial Evidence of the Classification Standards of the General Industry.

In the *Final Determination*, Commerce referred to salmon industry classification standards to support its determination that super-premium and premium grade salmon were identical. *See* 63 Fed. Reg. at 31,414–15. Commerce stated that industry standards in Norway, Scotland, Canada, and the United States make no distinction between super-premium and premium grade salmon. *See id.* Commerce claimed that these standards support the conclusion that super-premium and premium grade salmon must be treated as identical merchandise under the statute. *See id.*

Pesquera claims that Commerce improperly considered evidence of industry practice when its analysis concerning grade should have been restricted to Pesquera's practice only. *See* Pesquera's Br., at 43–48. Pesquera bases this argument on the "same person" language of the statute. *See* 19 U.S.C. § 1677(16); Pesquera's Br., at 43–48. Pesquera also claims that the record does not contain evidence of industry standards supporting Commerce's determination. *See* Pesquera's Br., at 43–48.

The Court does not agree. The statute on its face does not prohibit Commerce's evaluation of industry standards when determining whether particular products are identical. *See* 19 U.S.C. § 1677(16). The "same person" language of the statute applies only to the origin of the merchandise, not to whether particular merchandise is identical. *See id.*

---

[3] Pesquera claims that this statement was made concerning filleted salmon only. *See* Pesquera's Reply Br., at 32. Pesquera, however, mischaracterizes its prior position. The statement was made in a general discussion of the differences between super-premium and premium grade salmon. *See* App. to Commerce's Br., Vol. II, at Ex. 10 (Letter from Michael T. Shor to William M. Daley on Nov. 3, 1997, at 14–15). Following the statement, Pesquera offered an example using filleted salmon to illustrate its general contention. *See id.*

[4] Pesquera blatantly mischaracterizes the record evidence by arguing that the Asociación de Productores de Salmón y Trucha de Chile (A.G.) standards do not distinguish between super-premium and premium grade salmon based, in part, on meat color. *See* Pesquera's Reply Br., at 34–37. In fact, the Asociación standards require a meat color of fourteen for premium salmon and a meat color *above* fourteen for super-premium salmon. *See* App. to Commerce's Br., Vol. II, at Ex. 9 (Letter from Michael T. Shor to William M. Daley on Oct. 10, 1997, Attach. 1 (Asociacíon Standards)).

Moreover, the Court cannot find, and Pesquera does not supply, any authority which restricts evidence to the individual producer's standards.[5]

Under *Chevron*, Commerce's use of industry standards to evaluate whether merchandise is identical is a reasonable interpretation of the statue. *See* 467 U.S. at 843. As discussed above, the statute does not direct Commerce in regard to the term identical. *See* 19 U.S.C. § 1677(16). Thus, Commerce is free to employ reasonable methodology to determine whether merchandise is identical. *See Chevron* 467 U.S. at 843. Commerce's consideration of industry standards is reasonable because industry standards indicate what most salmon producers consider to be identical merchandise.

Further, the record contains substantial evidence of the industry standards of several countries. The *Final Determination* refers to direct evidence of Scottish standards. *See* 63 Fed. Reg. at 31,414 n.2. And, contrary to Pesquera's claims, the administrative record contains evidence concerning the industry standards of Norway, Canada, and the United States. *See* App. to Commerce's Br., Vol. I., at Ex. 8 (Letter of Aug. 14, 1997 from Michael J. Coursey, et al. to Sec. of Commerce, 3); App. to Commerce's Br., Vol. II, at Ex. 10 (Letter of Nov. 3, 1997 from Michael T. Shor to William M. Daley, 20); App. to Commerce's Br., Vol. II, at Ex. 12 (Letter of Dec. 11, 1997 from Collier, Shannon, et al. to Sec. of Commerce, Ex. 2 at 3)(affidavit of Canadian industry participant); App. to Commerce's Br., Vol. III, at Ex. 19 (Mem. Of Apr. 7, 1998 from Gabriel Adler and David Dirstine to Gary Taverman, 13); App. To Commerce's Br., Vol III, at Ex. 22 (Pet.'s Case Br. at 17, 21). Such information, although not dispositive, is evidence supporting Commerce's conclusion.

IV.

CONCLUSION

For all of the foregoing reasons, the Court sustains the portions of the *Final Determination* pertaining to Commerce's decision to treat superpremium and premium grade salmon as identical merchandise. A separate order will be entered accordingly.

---

[5] Pesquera does offer three Commerce decisions to support its argument. *See Certain Pasta from Italy*, 61 Fed. Reg. 30, 326, 30,346 (June 14, 1996); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 61 Fed. Reg. 13,815, 13,821 (March 28, 1996); *Certain Cut-to-Length Steel Plate from Finland*, 63 Fed. Reg. 2,952, 2,954–55 (Jan. 20, 1998). These Commerce decisions, however, do not support Pesquera's position. *Certain Pasta from Italy* and *Corrosion-Resistant Carbon Steel from Canada* concern the selection of product matching criteria. *See Certain Pasta from Italy*, 61 Fed. Reg. at 30,346; *Corrosion-Resistant Carbon Steel from Canada*, 61 Fed. Reg. at 13,821. These determinations do not analyze whether the merchandise is identical under such criteria. *See id. Certain Cut to Length Steel Plate from Finland* is even more inappropriately cited, as this decision concerns an adverse inference of a missing conversion factor. *See* 63 Fed. Reg. at 2,954–55.

NOTE: This is to advise that Slip Op. 00–66 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 00–66)

ALLEGHENY LUDLUM CORP. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99–06–00362

(Dated June 7, 2000)

(Slip Op. 00–67)

SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–12–02066

[Final results of redetermination on remand sustained.]

(Decided June 9, 2000)

Creskoff & Doram, L.L.P. (Stephen M. Creskoff, Robert T. Hume, Lisa E. Smilan) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Robert E. Nielsen*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION

I. BACKGROUND

BARZILAY, *Judge:* This case provides another chapter in the evolution of methods for determining normal value in cases where dumping has been alleged for products manufactured in nonmarket economies.[1] Before the Court is Commerce's *Final Results of Redetermination On Remand Pursuant to Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, Court No. 97–12–02066 ("Remand Determination"). Shakeproof Assembly Components ("Shakeproof") originally brought this case challenging certain aspects of the Department of Commerce, International Trade Administration's

[1] Normal value in market economy cases is generally the price at which the foreign product is first sold in the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(B)(i) (1994). However, in nonmarket economies the statute directs the Department of Commerce ("Commerce") to value the merchandise on the basis of the factors of production. *See* 19 U.S.C. § 1677b(c) (1994). The export price (or constructed export price) is generally the price of the merchandise at importation after certain statutory adjustments are made. *See* 19 U.S.C. §§1677a(a)–(b) (1994). The amount by which the normal value exceeds the export price or constructed export price is the dumping margin. *See* 19 U.S.C. § 1677(35)(A) (1994).

("Commerce" or "ITA") final determination in *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 61794–801 (Nov. 19, 1997) ("Final Determination"). Commerce assigned Hangzhou Spring Washer Plant, subsequently known as Zhejian Wanxin Group, Co. ("ZWG"), a respondent in the original investigation, an individual dumping margin. On November 15, 1996, Commerce initiated the third annual review covering the period October 1, 1995—September 30, 1996.[2] Commerce published its preliminary determination on July 11, 1997[3] and its Final Determination on November 19, 1997.[4]

Commerce's designation of China as a nonmarket economy went unchallenged; therefore, Commerce used a factors of production analysis, pursuant to 19 U.S.C. § 1677b(c) (1994), to determine the normal value for the helical spring lock washers ("washers") produced by ZWG. Commerce, without objection, chose India as the appropriate surrogate country pursuant to 19 U.S.C. § 1677b(c)(4). Plaintiff did challenge Commerce's use of the price paid for steel wire rod imported from the United Kingdom by ZWG, accounting for 34.7 percent of ZWG's total purchases of steel wire rod during the period of review ("POR"), to value all steel wire rod. Additionally, Plaintiff argued that Commerce failed to verify the price information ZWG submitted and miscalculated the final dumping margin by using duplicative and aberrational data. Defendant agreed that a remand was required to enable Commerce to recalculate the value for steel scrap by eliminating duplicate total quantity and value figures for the period April 1995—August 1995.

For the reasons discussed in *Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 23 CIT ___, 59 F. Supp.2d 1354 (1999) ("*Shakeproof I*"), the Court remanded the case to the agency to explain with reference to the record how the use of import price data for steel wire rod to value all steel wire rod, including domestically sourced rod, promoted accuracy in this case, to recalculate the steel scrap factor by eliminating duplicative data and certain import data which were aberrational, and to explain why good cause did not exist to verify the steel wire rod import price information submitted by the respondent.

In its Remand Determination, Commerce asserted that it complied with the Court's instructions. In its *Comments Respecting the Final Results of Redetermination on Remand, Submitted on Behalf of Shakeproof Assembly Components Division of Illinois Tool Works Inc.* ("*Pl.'s Comments*"), Plaintiff challenges Commerce's Remand Determination on several bases. Plaintiff first disputes Commerce's methodology, contending that Commerce unlawfully applied a rule not effective during the POR to the facts of this case. Hence, Shakeproof claims, Commerce

---

[2] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 61 Fed. Reg. 58513 (Nov. 15, 1996).

[3] *Certain Helical Spring Lock Washers From People's Republic of China; Preliminary results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 37192 (July 11, 1997).

[4] Final Determination, 62 Fed. Reg. 61794–801 (Nov. 19, 1997).

did not apply relevant administrative and judicial precedent in its Remand Determination. Plaintiff further asserts that Commerce did not follow the Court's instruction to explain how its use of import prices to value the entire factor of production for steel wire rod promotes accuracy, with reference to the record. Finally, Plaintiff states that verification of ZWG's steel import prices was required.

Commerce reaffirms its contention that it complied with the Court's instructions in *Def.'s Comments in Rebuttal to Comments Respecting the Final Results of Redetermination on Remand, Submitted on Behalf of Shakeproof Assembly Components Division of Illinois Tool Works Inc.* ("Def.'s Comments"). Commerce states that it properly used import prices for domestically-purchased materials to promote accuracy, and that the agency properly determined that good cause did not exist to verify prices submitted by ZWG. Because the Court finds that Commerce's conclusions are both reasonable and supported by substantial evidence, the Court affirms the Remand Determination.

II. DISCUSSION

A. Standard of Review

In reviewing a challenge to Commerce's determination in an antidumping administrative review, the Court is to hold unlawful a determination, finding or conclusion by Commerce that is unsupported by substantial evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "In applying this standard, the court affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Industrial, Inc. v. United States*, 22 CIT ____, ____, 7 F. Supp. 2d 997, 1000 (1998) ("*Olympia II*") (citing *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 138, 744 F. 2d 1556, 1563 (1984)).

To determine whether Commerce has acted in accordance with law the court must ask whether the agency's actions were reasonable under the terms of the relevant statute. In *Shakeproof I*, the Court noted that the relevant statute did not speak directly to the issue of any particular methodology Commerce must employ to value the factors of production, and that discretion was therefore vested in Commerce to develop the details of its methodology. 23 CIT at ____, 59 F. Supp.2d at 1357. Thereafter, the Court proceeded to examine whether Commerce acted reasonably pursuant to the second step of the *Chevron* analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). The Court reserved judgment on the reasonableness of Commerce's action, and now reviews Commerce's Remand Determination for that purpose.

In the interim, however, the Supreme Court has revisited the issue of how much deference, and in what circumstances, a reviewing court owes to the actions of an executive agency. In *Christensen v. Harris County*, No. 98–1167, 2000 U.S. LEXIS 3003, at *19 (May 1, 2000), the Supreme Court refused to extend *Chevron* deference (courts must defer to an agency's interpretive regulation construing an ambiguous statute) to an opinion letter issued by the Department of Labor's Wage and Hour division because its interpretation of the statute at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* Both the majority and dissenting opinions recognized that deference is accorded to agency interpretations embodied in formats other than formal adjudications and notice and comment rulemaking. Courts continue to apply deference based on how persuasive or authoritative the reviewing court finds the agency interpretations when compared to the statutory language.[5]

The preliminary question that the Court must answer is whether the *Christensen* opinion requires a change in the level of deference granted to such agency interpretations. Noting that only the majority opinion is binding, the Court finds that a brief analysis of the majority, concurring, and dissenting opinions is helpful in arriving at an accurate conclusion. The *Christensen* majority held that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 20 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256–258 (1991)). Moreover, in response to the government's claim that the opinion letter should be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997), the majority stated, "In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. *Id.* at 461. * * * But *Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* at 21–22.

Justice Scalia concurred in the judgment, but disagreed with the majority that the Department of Labor's opinion letter was not entitled to *Chevron* deference, stating that an agency's position warrants *Chevron* deference if it represents the authoritative view of the agency. *Id.* at 26. Justice Breyer's dissent seems to harmonize the apparent difference between the "respect" discussed in *Skidmore* and the "deference" referred to in *Chevron*:

> *Skidmore* made clear that courts may pay particular attention to the views of an expert agency where they represent 'specialized experience,' even if they do not constitute an exercise of delegated lawmaking authority. * * * As Justice Jackson wrote for the Court, those views may possess the 'power to persuade' even where they lack the 'power to control.' *Chevron* made no relevant change. It simply focused upon an additional, separate legal reason for defer-

---

[5] *See Genesco v. United States*, No. 92–02–00084, 2000 Ct. Intl. Trade LEXIS 58 (May 23, 2000) (delineating the *Christensen* opinions' analyses of Chevron applicability).

> ring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations.

Id. at 35–36 (citations omitted).

While the reach of *Christensen* remains to be delineated, the Court can rely on the majority's reconfirmation that persuasive agency interpretations are entitled to the "respect" articulated in *Skidmore*.[6] As the Supreme Court stated over 35 years ago, "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, the Court will uphold the agency's reasonable interpretation of its own ambiguous regulation, as per the Supreme Court's holding in *Auer*, 519 U.S. at 461. Indeed, as the Federal Circuit has stated, "[o]ur duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F. 2d 660, 665 (Fed. Cir. 1992).

The regulation at issue is entirely silent regarding the valuation of an entire factor of production based on the value of less than one hundred percent of the input imported from a market economy. Therefore, this Court's task is to assess the reasonableness of Commerce's interpretation to allow for valuation based on the actual value of the inputs imported from a market economy, and to uphold a reasonable interpretation.

B. The Use of Actual Import Prices to Value a Factor of Production in a NME is Reasonable.

A reasonable interpretation of a statute or regulation is one that furthers the underlying purpose of that statute or regulation. In *United States v. Vogel Fertilizer Co.*, 455 US 16, 26 (1982) the Supreme Court noted that a "[r]egulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.'" (quoting *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979)). "The purpose of the Act [19 U.S.C. §1677b(c)(1)(B)] is to prevent dumping, an activity defined in terms of the marketplace. The Act sets forth procedures in an effort to determine margins 'as accurately as possible.'" *Lasko Metal Products, Inc. v. United States*, 43 F. 3d 1442, 1446 (Fed. Cir. 1994) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990)). Moreover, "[t]he Act simply does not

---

[6] The Supreme Court has recently granted *certiorari* in *Mead Corp. v. United States*, 185 F. 3d 1304 (Fed. Cir. 1999), *cert granted*, 68 U.S.L.W. 3566 (U.S. May 30, 2000) (No. 99–1434), a case in which the Court of Appeals for the Federal Circuit declined to extend *Chevron* deference to a classification ruling by the Customs Service. Presumably the resulting opinion will give further guidance on this issue.

say-anywhere-that the factors of production must be ascertained in a single fashion." *Id.*

The statute provides for the most accurate determination of margins by requiring an ITA determination to be based on the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). In NME factors of production cases, Commerce has generally used surrogate data to determine the dumping margin. Indeed, "this court has repeatedly upheld the use of surrogate data to value certain factors of production when it amounts to the best available information." *Olympia II*, 22 CIT at ____, 7. F. Supp.2d at 1001 n.2. (citing *Tehnoimportexport, UCF America, Inc. v. United States*, 16 CIT 13, 16, 783 F. Supp. 1401, 1405 (1992)). Surrogate values may provide the best information available, even though, as this court has previously recognized, "the surrogate values used by Commerce in NME FOP cases are fictional." *Id.* at 1001.

In this case, Commerce used actual import data, instead of surrogate data, to value a factor of production. Actual import data may be the best available information to accurately value a factor of production in a NME, and therefore this method of valuation arguably may provide more accurate information than the use of fictional surrogate data. Indeed, as this court has previously stated,

> Commerce's task in a nonmarket economy investigation is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces. As Commerce incisively stated in *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55271, 55275 (Dep't Commerce 1991) (final determination): "[r]equiring the use of surrogate values in a situation where actual market-based prices incurred by a particular firm are available would be contrary to the statutory purpose."

Tianjin Machinery Import & Export Corp. v. United States, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992). Standing alone, the use of the market price actually paid for valuing a factor of production is reasonable because it brings market price into the comparison. *See Lasko*, 43 F. 3d at 317 ("Only if the combination of surrogate values and market-based values would somehow produce less accurate results would Commerce's use of this information be unreasonable."). Therefore, using surrogate value is not the only way to value a factor of production. However, the Court must still address whether Commerce's use of 35 percent of the steel inputs to value the cost of all the steel inputs used to produce the imported HSWs is supported by substantial evidence on the record in this case.

C. COMMERCE'S EXPLANATION OF HOW ITS USE OF THE MARKET PRICE OF 35 PERCENT OF THE STEEL INPUTS TO VALUE THE COST OF THE ENTIRE FACTOR OF PRODUCTION FOR STEEL WIRE ROD IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In *Shakeproof I*, the Court ordered Commerce to "explain, with reference to the record, how its use of import prices in this case has led to the calculation of a more accurate dumping margin than any of the alternatives available to it." *Shakeproof I*, 23 CIT at ___, 59 F. Supp.2d at 1357. Commerce sufficiently followed the Court's mandate in this regard.

Asserting that its valuation of domestic steel wire is consistent with NME methodology, Commerce states:

> The purpose of the factors of production methodology is to determine what NV would be if the producer's costs were set by the market forces in a comparable economy. Because the import is an actual market price paid by the NME producer it provides a more accurate value than other potential surrogates. Therefore, the actual price paid for the imports constitutes the best available information for valuing this factor.

Id. at 3.

Commerce then proceeds to explain its use of the term "meaningful." *Id.* at 4–5.[7] The definition of "meaningful" changes on a case-by-case basis, and Commerce finds a quantity of imports to be meaningful "if we can reasonably conclude from the quantities sold, and other aspects of the transactions, that the price paid is a reliable market economy value for the input." *Id.* at 5. Commerce points to evidence on the record showing that ZWG purchased more than one-third of the wire rod it used in the production of the merchandise from a market economy, and that the total imported amount of steel wire rod exceeded any amount purchased from any one of the seven domestic suppliers. *Id.* at 5–6.

Shakeproof asserts that the Remand Determination does not comply with the Court's directive to demonstrate that the use of import prices to value domestically purchased materials promotes accuracy. *Pl.'s Comments* at 6. Plaintiff contends that in justifying its use of import prices to value domestically purchased materials, Commerce *sub silentio* applied a recently adopted regulation, 19 C.F.R. § 351.408(c)(1)(1999) as a codification of prior practice.[8] *Pl.'s Comments* at 4. "Commerce's premature application of the alternative surrogate methodology set forth in Section 351.408(c)(1) to this case violates its own rule regarding effective dates and the Administrative Procedure Act's rulemaking requirements, and is void." *Id.* at 5–6. It is true that the new regulation codifies the practice of using the value for an imported input to value all domestically-sourced inputs as well. It is also true that as regards statutes, "a

---

[7] As the Remand Determination notes, "In making this decision, the Department has taken into account the concern expressed by the Court that describing 'meaningful' as 'not insignificant' was no definition at all." *Id.* at 4 (quoting *Shakeproof I*, 23 CIT at ___, 59 F. Supp.2d at 1358).

[8] Plaintiff asserts that although Commerce did not directly state that it was applying §351.408(c)(1), "the absence of any detailed factual analysis of how accuracy is promoted in Commerce's Remand Determination now indicates beyond dispute that its decision to use ZWG's steel import prices as an alternative surrogate value is based solely on the methodology set forth in Section 351.408(c)(1)." *Pl.'s Comments* at 5.

statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (citing *Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928)). The general rule disfavoring retroactivity applies as well to administrative regulations. *See Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365, 738 F. Supp. 541, 543 (1990) ("[A]n administrative regulation will not be construed to have retroactive effect unless the language requires such a result.").

The relevant portion of the prior regulation contains the following language:

> (c) Use of factors of production. If such or similar merchandise is not produced in a non-state-controlled-economy country which the Secretary concludes to be comparable in terms of economic development to the home market country, the Secretary may calculate the foreign market value using constructed value based on factors of production incurred in the home market country in producing the merchandise, including, but not limited to, hours of labor required, quantities of raw materials employed, and amounts of energy consumed, if the Secretary obtains and verifies such information from the producer of the merchandise in the home market country.

19 C.F.R. § 353.52(c). Commerce's actions in this case do not conflict with the regulatory language. Commerce used the actual price paid for one-third of the imported steel wire rod to value the entire production of steel wire rod. Although using the actual price to value a factor of production in this manner is not expressly permitted by the prior regulation, neither is it prohibited by the regulation's language. In the Court's view, Commerce has not acted beyond its regulatory authority.

Once again, the Court notes that using surrogate value is not the only way to value a factor of production. As the *Tianjin* court noted, "[n]othing in the Tariff Act of 1930 * * * or its legislative history mandates that Commerce must derive foreign market values exclusively from either actual prices paid by the nonmarket economy, or from surrogate based values." 16 CIT at 940, 806 F. Supp. at 1018. As such, "Commerce may use evidence of prices paid by the nonmarket economy country to market-economy suppliers in combination with surrogate country information when valuing factors of production." *Id.*, 16 CIT at 941, 806 F. Supp. at 1018. The ITA could have taken the action it did even under the former regulatory scheme, and has sufficiently explained its reasons for

changing its valuation methodology.[9] Commerce explains that its valuation methodology is in accordance with the prior regulation.

> Although Shakeproof is correct that the contested valuation methodology for steel wire rod was never used in any prior HSLW segment, the claim is misleading. Though this valuation methodology has never been used in any prior HSLW segment, ZWG has never used a significant amount of steel wire rod imported from a market economy country as an input before this period of review (POR).

Remand Determination at 10, Cmt. 1.

Shakeproof claims that Commerce is bound to follow the precedent set forth in *Olympia II*, which dealt with the reliability of the PRC trading company data for valuing steel inputs used to produce heavy forged hand tools. *Pl.'s Comments* at 9. Plaintiff is again incorrect. That case carved out an exception to the rule that "[t]he cost of raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy," and is therefore the best information available in a factors of production analysis. *Lasko Metal Products, Inc. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992), *aff'd*, 43 F.3d 1442 (Fed. Cir. 1994). *Olympia II* provided that Commerce would not have to use actual import data to value a factor of production if the agency could make a case that it was not the actual import data, but surrogate data, that would provide the best available information in determining a factor of production. *See Olympia II*, 22 CIT at ____, 7 F. Supp. 2d at 1002.[10] "The criteria Commerce employed to assess the reliability of the import prices in the *Olympia* Remand were, *inter alia*: (1) the value and volume of steel imports, (2) the type and quality of the imported steel, and (3) consumption of imported steel by the NME producers." *Pl.'s Comments at 12,* (quoting *Olympia Industrial, Inc. v. United States,* No. 99–18, slip op. At 6 (CIT Feb 17, 1999) ("*Olympia III*")). Plaintiff argues that these criteria should have been used in this case to evaluate the reliability of ZWG's import prices. *Id.*

The Court agrees with Defendant that Commerce is not bound by the *Olympia* criteria, but has correctly adhered to the *Lasko* tenet that "it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko*, 43 F. 3d at 1443. As Defendant states, a critical difference exists between the facts of *Olympia* and the facts of this case. *See Def.'s Comments* at 6. "[T]he PRC producer in the instant case, purchased its steel wire rod from a

---

[9] Commerce disputes the assertion that it applied 19 C.F.R. §351.408(c)(1) to this case, claiming that its reference to §351.408(c)(1) was cited in the remand results "only as a restatement of the agency's interpretation of the Uruguay Round Agreements Act." *Def.'s Comments* at 5. The only mentions of 19 C.F.R. §351 are in reference to the recodification of 19 C.F.R. §353.18(c), and to emphasize Commerce's point that there was not during the POR nor is there currently a requirement in the statute or regulations that Commerce verify actual market economy import prices used to value an input. *See* Remand Determination at 5, 17.

[10] In *Olympia II*, this court refused to uphold Commerce's redetermination results because "Commerce fails to offer a reason why relying on this market-based data somehow produces less accurate results than using other surrogate date." 22 CIT at ____, 7 F. Supp. 2d at 1002 (citing *Lasko*, 16 CIT at 1081, F. Supp. at 317.). In *Olympia III*, this court finally sustained the redetermination upon reviewing Commerce's explanation that "after examining the pricing data * * * the prices paid by the trading company were aberrationally low, even though purchased from a market-economy source and paid for in convertible currencies." *Olympia III*, No. 99–18, slip op. at 8.

market economy supplier through a market economy trading house paying in convertible, hard currency. By way of contrast, Olympia, a PRC producer, purchased its steel from a PRC trading house, paying for the goods in Chinese currency." *Remand Determination* at 15, Cmt. 3. The Court cannot agree with Plaintiff that Commerce concedes that it is comparing two potential surrogates, rather than evaluating actual market prices as opposed to surrogate data. *Pl.'s Comments* at 13. Here, the PRC producer purchased its steel wire rod from a market economy supplier through a market economy trading house and paid in market economy currency; Commerce is, therefore, not bound by *Olympia* and need not apply the *Olympia* criteria to determine if its valuation system is reliable.

Plaintiff also contends that Commerce's explanation that the steel wire rod imported from the United Kingdom constitutes more than one-third of the wire rod used in the production of the washers is insufficient. *Pl.'s Comments* at 7. "[W]ith the exception of a perfunctory review of the quantity of steel wire rod purchased from the United Kingdom compared with the quantities purchased from seven domestic suppliers," Commerce made no attempt to explain, with reference to the record, its use of import prices to value the entire factor of production. *Id.* at 3. Plaintiff further asserts that in conjunction with supplying "only [one] additional factual embellishment, compared to the Final Determination remanded by the Court," Commerce has not explained how accuracy is promoted by its methodology. *Id.* at 7. Accordingly, Plaintiff contends, "substantial evidence on the record does not support Commerce's determination, and the methodology employed by Commerce is unreasonable." *Id.* at 9.

The Court finds this argument unconvincing. As stated in *Shakeproof I*, "[w]hile Congress has left it within Commerce's discretion to develop methodologies to enforce the antidumping statute, any given methodology must always seek to effectuate the statutory purpose-calculating accurate dumping margins." *Shakeproof I*, 23 CIT at ____, 59 F. Supp.2d at 1358. The Court also made clear in *Shakeproof I* that "the use of import prices to value domestically purchased material will not promote accuracy, fairness or predictability unless Commerce explains its finding of significance." *Id.* Commerce did explain its finding of significance, with sufficient albeit minimal reference to the record. It is reasonable to assume that accuracy is promoted when the price paid for the largest single purchase of a certain input is used to value all of that input. Thus, Commerce complied with the Court's order to show how its use of import prices promotes accuracy; its methodology is supported by substantial evidence and is otherwise in accordance with law.

D. Commerce Properly Explained Why Good Cause Does Not Exist to Verify the Import Price Information For Steel Wire Rod.

In *Shakeproof I*, the Court directed Commerce to reconsider its use of unverified import prices and explain why good cause does not exist to

verify the prices that ZWG submitted. *Id.* at 1359. The applicable regulation directs the Secretary of Commerce as follows:

> (a) *In general.* (1) the Secretary will verify all factual information the Secretary relies on in:
>
> (i) A final determination under § 353.18(i) or § 353.20;
> (ii) The final results of an expedited review under § 353.22(g);
> (iii) A revocation under § 353.25;
> (iv) The final results of an administrative review under § 353.22(c) or (f) if the Secretary decides that good cause for verification exists; and
> (v) The final results of an administrative review under § 353.22(c) if:
>
> (A) An interested party, as defined in paragraph (k)(3), (k)(4), (k)(5), or (k)(6) of §353.2, not later than 120 days after the date of publication of the notice of initiation of review, submits a written request for verification; and
> (B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

19 C.F.R. § 353.36(a) (1996). The Court of Appeals for the Federal Circuit addressed the issue of when verification is required based upon the "good cause" standard in *Torrington Co. v. United States*, 68 F.3d 1347, 1350 (Fed. Cir. 1995). In that case, the court rejected appellant's argument that the standard is an objective one and, using the *Chevron* analysis, stated:

> The Commerce Department's determination that the Secretary retains substantial discretion in deciding when "good cause" for verification is shown is a permissible interpretation of section 1677e(b)(3)(B), particularly in light of the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources.

Id. at 1351 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Regardless of whether the Chevron analysis applies, investigating authority vested in an agency includes the discretion to decide what methods to use. *See Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Manufs. v. United States*, 23 CIT ____, ____, 44 F. Supp. 2d 229, 258 (1999) ("Since the statute does not specify what constitutes best available information, these decisions are within Commerce's discretion.").

In this case, a verification did occur during the first administrative review; therefore, Plaintiff was prevented from requesting verification in the normal course. *Shakeproof I*, 23 CIT at ____, 59 F. Supp. 2d at 1359. In order to be successful, Plaintiff would have to have shown that good cause existed for verification to occur again in the third review. *See*

19 U.S.C. §1677 m(1).[11] Plaintiff argues that such a request in this case would have been futile and that it had no reason to request verification since it did not know that Commerce might use actual import prices to value the steel inputs. Plaintiff disagrees with Commerce that there was no good cause, citing price discrepancies and the general proposition that good cause for verification exists whenever import prices are used to value non-imported materials.

In its Remand Determination, Commerce explains that the discrepancies cited by Plaintiff were corrected in a further submission by ZWG. *Remand Determination* at 8. In addition, Commerce argues that it is not required to verify actual market economy import prices and that Plaintiff did not and does not object to that price being used to value the imported steel itself. Furthermore, Commerce suggests that Plaintiff should have requested "good cause" verification during the administrative review if it thought the price was not credible. *Id.* at 17, Cmt. 4. In support of this assertion, Commerce cites to several instances wherein the Department conducted verifications when an interested party requested and could demonstrate that good cause existed, even though a verification was already conducted within the two immediately preceding reviews.[12] *Id.* at 8.

Commerce's explanations in its remand on this point satisfy the Court's directive to explain why good cause did not exist to verify the actual prices for imported steel. Because Commerce's explanations are reasonable and the decision whether to verify is within its discretion, the Court affirms this portion of Commerce's remand determination.

IV. CONCLUSION

For the foregoing reasons, the Court affirms the Remand Determination. An order so stating will be entered accordingly.

---

[11] 19 U.S.C. §1677m(i) provides:

> The administering authority shall verify all information relied upon in making
> (1) a final determination in an investigation
> (2) a revocation under section 1675(d) of this title, and
> (3) a final determination in a review under section 1675 (a) of this title, if—
>
> (A) verification is timely requested by an interested party as defined in section 1677 (9)(C), (D), (E), (F), or (G) of this title, and
>
> (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 1675(a) of this title of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.

[12] *See Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 42806, 42813 (Aug. 19, 1994) (permitting verification in a less-than-fair-value investigation even though a verification was conducted in the preceding administrative review); *Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 Fed. Reg. 35188, 35192 (July 5, 1996) (allowing verification where petitioners demonstrated good cause and the results from the preceding verification had not yet been received).

(Slip Op. 00–68)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
HITACHI AMERICA, LTD. AND HITACHI, LTD., DEFENDANTS

Court No. 93–06–00373

(Decided June 14, 2000)

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(James W. Poirier)*, for plaintiff.

Weil, Gotshal & Manges LLP (John R. Wing and *Yoav M. Griver)* for defendant Hitachi America, Ltd.

Kirkland & Ellis (David G. Norrell, Eugene F. Assaf, Paul F. Brinkman, and *Jason Beckerman)* for defendant Hitachi, Ltd.

OPINION

MUSGRAVE, *Judge:* Familiarity with the prior proceedings on this case is presumed[1]. After issuance of the mandate of the U.S. Court of Appeals for the Federal Circuit ("CAFC"), on July 20, 1999 the parties conferred in Court regarding Hitachi, Ltd.'s ("Hitachi Japan") motions for award of costs and judgment. Further proceedings were stayed at the government's request until September 30, 1999. Afterwards, the Court entered judgments in accordance with the appellate decision and, in view of the matters discussed at the conference and the arguable wording of that appeal[2], requested "briefing" on costs from all parties. Interpreting, Hitachi America, Ltd. ("HAL") and the government submitted their own requests for costs. On May 18, 2000, following oral argument, the Court granted all requests, in full to Hitachi, Ltd., in part to The United States of America, and in part to HAL, and ordered payment within 30 days. The Court's reasoning is as follows.

I

The Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA")[3], permits judicial award of the costs specified in 28 U.S.C. § 1920 in any civil action brought by or against the United States, its agencies, or officials. 28 U.S.C. § 2412(a)(1). Since the EAJA amounts to a waiver of sovereign immunity, it requires strict construction. *See, e.g., American Bayridge Corp. v. United States*, 24 CIT ___, 86 F. Supp.2d 1284, 1285 (2000); *Sigma Corp. et al. v. United States*, 20 CIT 852, 856, 936 F. Supp. 993, 997 (1996); *United States v. Modes Inc.*, 18 CIT 153, 154 (1994). The relevant provision reads:

> [A] court shall award to a prevailing party other than the United States * * * expenses * * * in any civil action (other than cases

---

[1] *United States v. Hitachi America, Ltd.*, 21 CIT ___, 964 F. Supp. 344 (1997), *rev'd in part, United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999); *on remand*, Slip Ops. 99–116 and 99–121, 74 F. Supp. 2d 1349 (1999).

[2] See 172 F.3d at 1338.

[3] Hitachi Japan briefed award of costs pursuant to the EAJA directly and HAL at oral argument requested EAJA consideration in addition to the reasons in its brief. Both parties' requests were pursuant to USCIT Rule 54(d), Rule 54(d) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1920.

> sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances exist that make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The United States Supreme Court considers a "prevailing party" is one who "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit", not success on each issue sued. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *quoting Nadeau v. Helgemoe*, 581 F.2d 275, 278–279 (1st Cir. 1978). The subordinate clause apparently contemplated suits against, not by, the United States, but more recently the Supreme Court indicated that "the touchstone of the prevailing party inquiry must be the *material alteration of the legal relationship of the parties* in a manner which Congress sought to promote in the fee statute". *Texas State Teachers Assoc. v. Garland Independent School Dis.*, 489 U.S. 782, 792–793 (1989) (highlighting added). However, a prevailing party's application may be denied if "the position of the United States was substantially justified or that special circumstances make an award unjust"[4], a matter of persuasion for the government, although facts of record may speak for themselves. *See, e.g., American Bayridge Corp., supra*, 24 CIT at ____, 86 F. Supp.2d at 1285; *Sigma Corp., supra*, 20 CIT at 856, 936 F. Supp. at 998.

Unarguably, Hitachi Japan attained prevailing party status on all counts following six weeks of trial, 18 government witnesses, and the appellate decision. At the cost hearing it argued that award was appropriate because the government had engaged in years of "aggressive" discovery including dozens of interrogatories, tens of thousands of documents translated from Japanese, and five weeks of depositions in Japan on the one hand while it "consistently fought" Hitachi Japan's discovery relating to its defense (which eventually revealed exculpatory or discrediting evidence). Moreover, it contended the government requested and received several postponements of the trial, thus increasing the costs of the litigation. To reinforce the impression, it pointed out that further to earlier Court order it had advanced the costs of travel for witnesses from Korea, Singapore, Indonesia, and England whose appearances had been demanded by the government and whose reimbursement pursuant to that order the government has been unreasonably haggling over since.

The government responded by urging the Court to deny Hitachi Japan's application based on the number of adverse trial findings, including: the fact that Hitachi Japan controlled the Atlanta MARTA project; the fact that it "constantly conferred" with HAL "over the contents of the entry documents"; the fact that it knew, through its officials, that economic price adjustments ("EPA") forwarded from the MARTA project were dutiable and that there were associated disclosure and report-

[4] 28 U.S.C. § 2412(d)(a)(A).

ing obligations and potential invoicing and reporting pitfalls; and the fact that it led HAL to the conclusion that it was permissible to pay EPA at the end of the project and never urged HAL to explore the issue to ensure compliance with law. Plaintiff's Opposition to Hitachi, Ltd.'s Request for an Award of Costs ("Plaintiff's HJ Opposition") at 2–3, referencing *United States v. Hitachi America, Ltd.*, 21 CIT ___, 964 F. Supp. 344, 378–379 (1997). The government considered Hitachi Japan's behavior "especially egregious" because of "assistance" spanning nearly a decade, control of the budget allocated to pay EPA duties, "reluctance * * * to permit the actual expenditure of that budget", and formulation of a plan to "repatriate" the budget, without payment of duty. *Id.* at 3, quoting *Hitachi* at 378–379. To emphasize these points, the government quoted several observations from the trial opinion, including that Hitachi Japan "*should have ascertained their duties with an aggression commensurate with the benefit they receive from doing business here.*" *Id.* at 3–4, quoting *Hitachi* at 390 (plaintiff's emphasis). Lastly, the government argued that the CAFC "conceded" the statute provided a cause of action "at first blush", and that the only reason Hitachi Japan is not now liable is because of their determination that such a cause of action conflicted with "fundamental legal logic". *Id.* at 4.

Nonetheless, the Court considered that the application of the appellate decision rendered irrelevant or at least moot the findings at trial against Hitachi Japan. Furthermore, the Court was not persuaded that the government's argument amounted to substantial justification on each claim against Hitachi Japan. The Court therefore granted Hitachi Japan's request for costs, plus interest. Hitachi Japan sought reimbursement from the government for process server fees, court reporting fees (including deposition, pre-trial and trial transcripts), exemplification and copying, translation, and witness fees. The amounts sought total $162,592.44, which Hitachi Japan averred were "by no means exhaustive of all expenses incurred" in its defense but which are "plainly taxable under the applicable rules, statutes and case law, and for which expenses could be ascertained with reasonable certainty." Defendant Hitachi, Ltd.'s Memorandum in Support of its Bill of Costs at 5. The Court examined Hitachi Japan's bill and supporting case law and found the items allowable.

II

The government filed for costs under 28 U.S.C. § 1918(a) and contended the statute mandates award of costs upon request. It provides that "[c]osts shall be included in any judgment, order, or decree rendered against any person for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for." The government claimed entitlement to costs because the "penalty assessed against Hitachi America, Ltd. in this case was imposed pursuant to 19 U.S.C. § 1592, an

act of Congress falling within the scope of 28 U.S.C. § 1918(a)." Plaintiff's Bill of Costs Against Hitachi America, Ltd. ("Plaintiff's Bill") at 1.[5]

HAL argued that even as amended the government's motion did not cure the "fundamental defects" of commingled costs and the absence of proof that the costs sought were "necessarily incurred" to prove the government's case in negligence. HAL further argued that the government advanced incorrect propositions, namely that the Court need not "look beyond * * * sworn declaration before taxing costs" and that the burden is upon HAL to disprove the amount of the government's costs[6], and argued that only properly documented and justified costs may be taxed.[7] HAL contended that the government mainly provided derivative costs, not actual invoices, and that these do not satisfy proving services "necessary" to the litigation. HAL also pointed out that the government's proposed bill did not account for overpayment of US$219,283 sent by HAL to the U.S. Customs Services in response to the 1991 pre-penalty notice, and it argued that this should be used to offset litigation costs, if any, assessed against HAL.[8]

The government argued that such objections are without merit, noting that it should have been "obvious" from the papers filed that it sought "only a very conservative portion of our actual and necessary

---

[5] The government filed its original bill and motion as of November 15, 1999. HAL responded that this was (1) unauthorized, *sua sponte*, in disregard of Slip Op. 99–121 "and the [CAFC] instruction on which it is based", (2) untimely since it should have been filed in 1997 when HAL was found liable (*i.e.*, HAL appealed the method by which the amount of the 19 U.S.C. § 1592 penalty was calculated but not the finding of negligence or the imposition of the penalty), and (3) unsupported by any documentation. Hitachi America[,] Ltd.'s Response in Opposition to the Government's Bill of Costs ("HAL's Response I") (citations omitted). The government then filed a motion to amend together with documents in support of its earlier filed bill on February 1, 2000 which explained that filing the government's bill first and supporting documentation thereafter comported with counsel's normal practice, or at least the Rules of the Court of International Trade as he understood them. Counsel pointed out that CIT Rule 54(d), providing that claims for "attorneys fees and related non-taxable expenses" must be brought no later than 14 days after entry of "judgment" (defined in CIT Rule 54(a) as "a decree and any order from which an appeal lies"), does not explicitly allow taxation of costs, whereas Rule 54(d)(1) of the Federal Rules of Civil Procedure allows "costs as of course to the prevailing party unless the court otherwise directs". In response, HAL elaborated that the attempted amendment did not cure the "untimely nature" of the original bill of costs, *i.e.*, that the November 5, 1999 order neither imposed a new penalty upon HAL nor addressed a new or superceding violation by HAL of an Act of Congress, and that even if the November 5th order provided a new window of opportunity to press claims the government missed that opportunity by not filing a properly verified application until February 1, 2000. Hitachi America, Ltd.'s Opposition to the Government's Motion for Leave to File an Amended Bill of Costs Against Hitachi America Ltd. ("HAL's Response II") at 2–3, referencing *inter alia* *Perez & Assocs., Inc. v. Welch*, 1990 WL 161032, *1 (E.D. La. 1990) ("When a party awarded costs fails to submit a timely application for costs that is properly verified or documented, the application should be rejected in its entirety").

To the extent the government questioned the jurisdiction of the Court of International Trade to award costs under 28 U.S.C. § 1920 and the EAJA, that matter has been settled. *See, e.g., United States v. Goodman*, 6 CIT 132, 141, 572 F. Supp. 1284, 1290 (1983). To the extent counsel claimed leeway insofar as CIT Rule 54(d) does not specify precise procedure for cost claims, counsel's earlier submission, unverified, did not, as contended, comport with the exception in CIT Rule 11 requiring pleadings and other papers to be verified or accompanied by affidavit where required by rule or statute. *See, e.g.*, 28 U.S.C. § 1924. Regarding HAL's contention, the argument applied with equal force to itself, since judgment for liability entered in 1997, on the other hand, the amount of the penalty was adjudged in Slip Op. 99–121 on remand. The November 5, 1999 order invited "briefing" on the appellate court conclusion, neither inviting nor precluding motions for cost. Hitachi Japan's motion for costs filed as of July 16, 1999, with supporting documentation filed as of November 19, 1999, complied with permissible procedure. In the end, the Court considered that the plaintiff's and HAL's motions, following Slip Op. 99–121, offset questions of timeliness and allowed them for consideration. The plaintiff's motion to amend, furthermore, sought only to provide supporting documentation and verification for and not alter the claimed amount of its earlier-filed bill, therefore the Court found no undue prejudice and it too was allowed for consideration.

[6] Plaintiff's Motion for Leave to File an Amended Bill of Costs Against Hitachi America, Ltd. at 3–4.

[7] HAL's Response II at 4–5 and n. 2, referencing *Wahl v. Carrier Manufacturing Co.*, 511 F.2d 209, 216 (7th Cir. 1975) (unsupported assertion that costs were necessarily incurred rejected as manifestly inadequate) and also *Davis v. Commercial Union Ins. Co.*, 892 F.2d 378, 385 (5th Cir. 1990)(necessity of costs sought could not be determined from application); *D&M Watch Corp. v. United States*, 16 CIT 509, 518, 795 F. Supp. 1172, 1180 (1992) (undocumented request for Federal Express costs rejected); *Perez & Assocs., Inc. v. Welch*, *supra*.

[8] Attached to HAL's Response I is also counsel's sworn statement, with attachment, that HAL paid the amount of the penalty and unpaid duties ordered at trial to the United States Customs Service.

costs". Plaintiff's Reply to HAL's Opposition to the Government's Motion for Leave to File an Amended Bill of Costs Against HAL at 2. The government contended that the Court gained knowledge of the fact that many of the documents obtained from HAL were in the Japanese language and had to be translated for trial, and that HAL's suggestion that the United States must provide detailed descriptions of the translation work to provide additional support is unreasonable and without basis in law. *Id.* Specifically, according to the government no statute or rule requires more than its sworn statement on the fees incurred for translation services, in particular 28 U.S.C. § 1918(a), 28 U.S.C. § 1924, and 28 U.S.C. § 1746.

To this, HAL stated at oral argument that only the documents in English related to its liability in negligence, a point which the government did not refute. On the substance of the government's motion, HAL contended that counsel misconstrued 19 U.S.C. § 1918(a) to require award of costs when the government prevails in litigation. HAL urged reading 19 U.S.C. § 1918(a) ("Costs *shall* be included * * *") in conjunction with 19 U.S.C. § 1920 ("A bill of costs *shall* be filed in the case and, *upon allowance*, included in the judgment or decree" and that "any court of the United States *may* tax as costs the following * * *"). HAL's Response I at 1–2 (counsel's highlighting). HAL argued that the government's "absolutist" stance should be rejected here, as it has been elsewhere[9], as encroachment upon traditional judicial discretion on such matters and as embodied in Fed. R. Civ. P. 54(d).

The government characterized HAL's argument as essentially that "28 U.S.C. § 1920 * * * repeals by implication the mandatory language of the more specific statute, 28 U.S.C. § 1918(a)", which renders the latter superfluous.[10] The government argued that its own reading was correct, in accordance with *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) and *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987).

The Court found *Alyeska* instructive on the legislative history of 28 U.S.C. §§ 1920 and 1923 but unsupportive on the contention that a violation of 19 U.S.C. § 1592 *required* award of costs to the United States under 28 U.S.C. § 1918(a)[11]. The principle it and *Crawford* articulate is that courts may not *expand* the scope or amounts of fees and costs Con-

---

[9] HAL's Response I at 2–3, referencing, *e.g.*, *United States v. Erie R. Co.*, 200 F.2d 411, 412 (6th Cir. 1952); *United States v. Indiana Harbor Belt Railroad Co.*, 209 F. Supp. 245, 246 (N.D. Ind. 1962); *see also United States v. Bowden*, 182 F.2d 251, 252 (10th Cir. 1950) ("taxation of costs is a matter vested in the sound discretion of the trial court"); *United States v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, 133 F. Supp. 76, 76 (D. Minn. 1955) ("That the allowance of costs in civil cases is within the sound discretion of the Court is universally recognized.").

[10] Plaintiff's Opposition to Hitachi America, Ltd.'s Request For An Award of Costs ("Plaintiff's HAL Opposition") at 2.

[11] Act of Feb. 26, 1853, 10 Stat. 161 sought to limit and standardize judgments for costs increasingly being allowed in federal litigation to prevailing parties as exceptions to the general American rule that litigants bear their own, although *Alyeska* also affirms the "inherent power in the courts to allow attorney's fees in particular situations, unless forbidden by Congress". *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975). *See generally id.* at 251–271. It is also perhaps worth noting that present-day 28 U.S.C. §§ 1918(a) and 1920 derive from a 1948 recodification of 28 U.S.C. §§ 822, 9a(a), and 830 (1940 ed.), at which time "may" was substituted for "shall" before "tax as costs" in § 1920 in view of Fed. R. Civ. Pro. Rule 54(d). No such change, however, was effected in § 1918(a). *See* Act of June 25, 1948, ch. 646, 62 Stat. 955.

gress has declared permissible to award prevailing parties, and *Crawford* tends to support HAL's interpretation of § 1920 insofar as it

> defines the term 'costs' as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.

482 U.S. at 441–442. However, reading 28 U.S.C. § 1920 here comes after that of 28 U.S.C. § 1918(a), on which *Crawford* reiterates that Congress means what it says, and that no statutory interpretation shall render other statutory provision superfluous. *Id.* at 442. After reviewing HAL's references, the Court considered that they were insufficient authority for the proposition sought[12], and that the government's logic was sound because the meaning of 28 U.S.C. § 1918(a) is plain: upon motion, "costs *shall* be included in any judgment, order, or decree rendered against any person for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for."[13] However, in keeping with *Crawford* as well as USCIT Rule (54)(d), Fed. R. Civ. P. 54(d), 28 U.S.C. § 1920, and 28 U.S.C. § 1923, the Court concluded that it had discretion over amounts "awarded".

The government's bill totaled $394,281.56. HAL contended that this (1) inaccurately represented nearly $150,000 more in costs than were incurred by HAL and Hitachi Japan combined (and despite their overlapping costs for photocopying, transcripts, *et cetera*), (2) coincidentally approximated an amount allegedly offered by the government in negotiations concerning the amount of HAL's overpayment (on which HAL's counsel has submitted his affidavit) and (3) admittedly sought to tax HAL for costs the government's bill alleged were incurred on matters concerning not HAL but Hitachi Japan[14]. HAL iterated that the government should only be entitled to costs "necessarily incurred" in properly litigating the negligence claim under 28 U.S.C. § 1924. On this last point, HAL painted a picture of

> the wasteful and disorganized manner in which the government litigated this case. Moreover, while HAL was ultimately found negligent, the majority (if not all) of the "costs" now claimed by the Government were doubtless incurred trying to support [its] "byzantine" fraud theory (a theory summarily rejected by a grand jury, this Court, and the Federal Circuit), not in trying to prove HAL negligent. It was in support of this failed theory that the Government

---

[12] In fact, statutes mandating award of fees and/or costs to prevailing parties are not uncommon: *e.g.*, 15 U.S.C. § 15 ("Any person who shall be injured in his business or property for reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"); Truth in Lending Act, 15 U.S.C. § 1640(a); Fair Labor Standards Act, 29 U.S.C. § 216(b); Merchant Marine Act of 1936, 46 U.S.C. § 1227.

[13] *Accord Barnes v. United States*, 223 F.2d 891 (5th Cir. 1955); *United States v. Erie R. Co.*, *supra*; *Boas Box Co. v. Proper Folding Box Corp.*, 55 F.R.D. 79, 171 U.S.P.Q. 549, 15 F.R. Serv. 2d 1136 (E.D. N.Y. 1971); *United States v. Southern Railway Co.*, 278 F. Supp. 60 (W.D. N.C. 1967); *United States v. Indiana Harbor Belt Railroad. Co.*, 209 F. Supp. 245 (N.D. Ind. 1962); *United States v. Northern Pacific Railway Co.*, 54 F. Supp. 843 (D.C. Minn 1944).

[14] The government's bill avers that the "actual costs for copying exceeded th[e claimed] amount, but we have limited our request to the amount sought by Hitachi, Ltd. in an effort to avoid litigation about the amount that was necessary." Plaintiff's Bill at 2, n. 1.

> sought worldwide document production, weeks of depositions in Japan, offered three separate damage calculations, amassed 68 binders of trial exhibits, and called 18 witnesses at trial. Likewise, it was in trying to prove HAL fraudulent that the Government engaged in unnecessary and expensive motion practice, repeatedly asserting inapplicable privileges to frustrate the production of exculpatory documents, and making a motion for summary judgment on the issue of fraud that fell so "far short of satisfying the criteria for awarding summary judgment" as to constitute a "waste of judicial resources".

HAL's Response I at 6–7, referencing the Court's Order of Jan. 19, 1996.

In the end, the Court noted that the government became involved in this litigation carrying a certain amount of "baggage" which had been conjured in part by the unethical and possibly illegal behavior of HAL's own employee. Also observing that the government could not produce the entry documents from the principal port of entry, Savannah, Georgia (apparently due to destruction, to the best of the Court's knowledge), that the extreme expense of depositions and discovery in Japan had not been, in the Court's opinion, addressed to the issue of negligence, and that had the trial focused on negligence it would have been much briefer and less precedential, the Court exercised discretion over the amount of costs to award the government and found $50,000.00 appropriate, which amount is to be offset against any sums due HAL.

III

HAL's written motion for costs offered no statutory justification therefor except appeal to judicial discretion. When questioned about this at the May 18, 2000 hearing, counsel replied that while HAL's briefs did not employ the magic words "prevailing party", he considered it "pretty clear that Hitachi America prevailed as to two out of three of the claims that were brought by the government. The Court of the Federal Circuit said that Hitachi America is entitled to its costs". Transcript of Hearing of May 18, 2000 at 49. In opposition to the government's motion for costs HAL also raised the point that the CAFC "addressed the issue of costs in its decision in this case, specifically directing that '[t]he government shall bear the costs of HAL and Hitachi Japan, as well as its own costs'", a decision the government did not appeal or attempt to have reheard and which became the law of the case on remand. HAL's Response I at 3, referencing, *e.g.*, *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977). The government, however, pointed out that Hitachi Japan's brief interpreted the decision of the CAFC as awarding the costs "of the appeal" to appellants, that the "Stipulated Bill of Costs" attached to the CAFC's mandate specified only about $1,500 in combined costs which pertained to the briefing of the appeal, that the issue of costs arising from proceedings at the trial level was not raised to the CAFC, and that the CAFC would not have had the authority to address the issue in any case because it is one to be determined at the trial level in the first instance. Plaintiff's HAL Opposition at 5–6, referencing *Friends of the*

Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc., ___ U.S. ___, 68 U.S.L.W. 4044, 120 S. Ct. 693, 711–712, 2000 WL 16307 (2000). This Court concurred with the government's interpretation on the appellate conclusion, but agreed with HAL that it was a "prevailing party" on the two issues of greater significance. *Cf. Helmsley v. Eckerhart*, *supra*, 461 U.S. at 435–436 (where claims arise out of a common core of facts and involve related legal theories, "the most critical factor is the degree of success obtained."). The Court also considered that the government did not have substantial justification on those two issues, and therefore granted HAL's request to that extent.

HAL's bill itemized some $100,539.03 in costs consisting of $15,964.42 for court reporting fees, $5,869.54 for exemplification and copies of papers "necessarily obtained for use in the case", $33,429.35 for interpretation services, and $45,275.72 for transcripts of depositions. The Court examined the items and found them adequately supported, and following consideration of the parties' presentations and positions it exercised discretion to award to HAL one half of its requested costs, plus interest.

IV

Following the hearing, the parties submitted an agreed-upon order to reflect those orders of May 18, 2000, which the Court approves herewith.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/40 5/16/00 Pogue, J.	Lear Corporation Eeds and Interiors	96-01-00054	9802.00.80 Without allowance for the value of U.S. components incorporated in subject merchandise	9802.00.80 With allowance for the value of the U.S. components incorporated in the subject merchandise	Agreed statement of facts	Detroit and Chicago Wire harnesses assembled in the Philippines
C00/41 5/19/00 Musgrave, J.	Imaginings 3, Inc.	97-09-01499	4202.12.20, 4202.32.20, 4202.92.45 20%	4823.90.85 4.2%	Agreed statement of facts	Chicago Bag expanders
C00/42 5/25/00 Eaton, J.	Dermabit Waterproofing Industries, Inc.	99-01-00018	5602.10.90 11.9% (1997) 11.7% (1998)	5603.14.90 5% (1997) 2.5% (1998) Duty free (1999)	Agreed statement of facts	Baltimore Nonwovens
C00/43 5/31/00 Barzilay, J.	Brown Printing Company, Inc.	97-04-00692	4810.29.00 2.2%	4802.60.90 Duty free	Agreed statement of facts	Not stated Uncoated paper
C00/44 5/31/00 Pogue, J.	Chevron Chemical Company, LLC	97-03-00425	2710.00.6000 7%	2710.00.2500 10.5¢ per barrel	Agreed statement of facts	Houston Naphtha
C00/45 6/8/00 Ridgway, J.	Itochu Specialty Chemicals	98-12-03248	3204.17.20 16.40% 3204.17.30 15% 3204.17.50 20% 3204.17.60 14.2% 3204.17.60 13.3% 3204.17.60 12.4%	3707.90.30 or its successor 3707.90.32 8.5%, 8.1%, 7.7%, or 7.3%	Agreed statement of facts	Chicago, Detroit Thermographic transfer printing ink

ABSTRACTED CLASSIFICATION DECISIONS—*Continued*

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/46 6/15/00 Musgrave, J.	Glencore Marketing, Inc.	95–1–00097	2710.00.60 7%	2710.00.25 10.5¢ per barrel	Agreed statement of facts	Port Arthur, TX Naphtha
C00/47 6/15/00 Ridgway, J.	GRK Canada, Ltd.	99–7–00422	7318.12.00 12.5%	7318.14.10 Not stated	Agreed statement of facts	Pembina, ND, Grand Portage, MN Threaded screws

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V00/9 5/31/00 Barzilay, J.	Notations, Inc.	94–09–00531	Transaction value	Merchandise defective at time of importation $5.33 per unit	Agreed statement of facts	New York 100% polyester jacquard woven blouses

Index

Customs Bulletin and Decisions
Vol. 34, No. 28, July 12, 2000

U.S. Customs Service

General Notices

Proposed Revocation

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 2000–461–850–80094